COPY

In the
United States Circuit Court of Appeals
For the Seventh Circuit

No. 8500

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

DANIEL K. CATLIN, FREDERICK PITZMAN AND LEWIS M. RUMSEY, JR., AS TRUSTEES UNDER DEED DATED FEBRUARY 1, 1921, ETC.,
Defendants-Appellants.

Appeal from the District Court of the United State for the Southern District of Illinois, Southern Division.

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Pleas in the District Court of the United States of America within and for the Southern Division of the thern District of Illinois, held in the City of Spring-, in said Division and District, before the Honorable rles G. Briggle and the Honorable J. Leroy Adair, ges of said Court, on Monday the fifth day of January, ne year of our Lord one thousand nine hundred and y-two, and of the Independence of the United States merica, the one hundred and sixty-sixth year.

ent:

Charles G. Briggle, District Judge.
J. Leroy Adair, District Judge.
Robert Grant, United States Marshal.
Howard L. Doyle, United States Attorney.
G. W. Schwaner, Clerk.

st:

G. W. Schwaner,
Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES

For the Southern District of Illinois,

Southern Division.

United States of America, *Petitioner,* *vs.* 1,113 Acres of Land, more or less, Situate in Madison County, Illinois, and Commonwealth Steel Company, a Corporation, *et al.*, *Defendants.*	Civil Action No. 228.

(Filed Mar. 31, 1942.)

Be It Remembered, that heretofore to wit: on the 31st day of March, in the year of our Lord one thousand nine hundred and forty-two, that being one of the days of the January Term, A. D. 1942, of the District Court of the United States for the Southern District of Illinois, Southern Division thereof, there was filed in the office of the Clerk of said court a certain Petition for Condemnation, which said Petition for Condemnation was and is in the words and figures following, to wit:

3 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—228) * *

PETITION FOR CONDEMNATION.

To the Honorable Judges of the District Court of the United States of America for the Southern District of Illinois:

Now comes the United States of America, Petitioner herein, by its Attorney, Howard L. Doyle, United States Attorney for the Southern District of Illinois, at the direction of and on behalf of the Attorney General of the United States of America, pursuant to the request of the Secretary of War, and files this, its Petition for Condemnation herein, and represents unto the Court as follows:

I.

That pursuant to the provisions contained in the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), and April 11, 1918 (40 Stat. 518, 50 U. S. C., Section 171), the Secretary of War is authorized to cause proceedings to be instituted in the name of the United States for the acquirement by condemnation of any land needed for the site, location, construction and prosecution of works for fortifications, coast defenses, mili-
4 tary training camps, and for the construction and operation of plants for the production of nitrate and other compounds, and the manufacture of explosives and other munitions of war, and that when such property is acquired in time of war upon the filing of the petition for the condemnation of any land immediate possession thereof may be taken to the extent of the interest to be acquired, and the lands may be occupied and used for such military purposes.

II.

That funds have been appropriated for the acquisition of lands needed for the prosecution of military affairs of the United States in connection with the present emergency by the Act of Congress approved December 17, 1941 (Public Law 353—77th Congress).

III.

That by letter dated March 26, 1942, the Secretary of War, Honorable Henry L. Stimson, requested the Attorney General of the United States to institute proceedings to acquire the lands hereinafter referred to in fee simple, together with the buildings and improvements thereon and the appurtenances thereto, subject, however, to existing easements for public roads and highways, for public utilities, for railroads, and for pipe lines, and that the United States be given the immediate right to the possession, use and occupancy of said land, buildings and improvements thereon and the appurtenances thereto, pursuant to the provisions of the Acts of Congress referred to in Paragraph I hereof.

IV.

That the land needed for the site, location, construction and prosecution of the works hereinabove referred to is more particularly described on Exhibit "A", and delineated on the plat marked Exhibit "B", both of which exhibits are attached hereto and by this reference made a part hereof, and that the names of the apparent owners of said land are as follows: Niedringhaus Trustees; the G. C.-St. L. & E. Belt Line Railroad; the Terminal Railroad Association; the Granite City Sewer R/W; the Commonwealth Steel Company, a Corporation; the Southern Railway; the East Side Levee and Sanitary District; and the Coal Land Syndicate, all of whom are hereby named as defendants in this petition.

V.

Wherefore, your petitioner prays that this Honorable Court enter an order condemning the lands herein described for the use of the United States of America in fee simple, together with the buildings and improvements thereon and the appurtenances thereto, subject, however, to existing easements for public roads and highways, for public utilities, for railroads, and for pipe lines, and that immediate possession thereof may be taken to the extent of the interest to be acquired and the land may be occupied and used for the military purposes hereinabove described.

And your petitioner further prays that the respective rights and interest in the real estate of the parties entitled thereto may be inquired into and ascertained by this court; and that the compensation which your petitioner shall pay for the real estate, together with all improvements thereon and appurtenances thereunto belonging, may be determined and ascertained according to law, and that such other and further proceedings may be had and taken in the premises as may be appropriate fully and completely to vest the United States of America with title to said land and all the tracts, pieces or parcels thereof, in fee simple absolute, together with the buildings and improvements thereon and appurtenances thereto, subject, however, to existing easements for public roads and highways, for public utilities, for railroads, and for pipe lines, free from any liens or claims of any person or persons,

corporation or body politic whomsoever; and that the Court may order the distribution of the compensation to the parties thereto entitled according to their respective rights, interest and ownership; and that your petitioner may have such further and other relief in the premises as the nature of its case shall require and to Your Honors shall seem meet.

Howard L. Doyle,
United States Attorney.

Indorsed, Filed March 31, 1942. G. W. Schwaner, Clerk.

7 NEW EXHIBIT "A".

(Filed Feb. 8, 1943. G. W. Schwaner, Clerk.)

A tract of land lying partly in Granite City, City of Madison and City of Venice, in Madison County, Illinois, being part of what is commonly known as Kerr Island and parts, respectively, of U. S. Surveys 604 and 616, Fractional Sections Fourteen (14), Twenty-two (22), Twenty-three (23), Twenty-four (24), Twenty-six (26), and Twenty-seven (27), in Township Three (3) North, Range Ten (10) West of the Third Principal Meridian, and more particularly described as follows, to wit:

Beginning at an iron pipe marking the intersection of the north line of Neidringhaus Avenue and the west line of Cedar Street in Granite City; thence south no degrees, six and one-half minutes east (S. 0° 06½′ E.) eighty and no-tenths (80.0) feet along the west line of Cedar Street to an iron pipe marking the intersection of the south line of Neidringhaus Avenue and the west line of Cedar Street; thence south no degrees, seventeen and one-half minutes East (S. 0° 17½′ E.) eight hundred sixty and one-tenth (860.1) feet along the west line of Cedar Street to an iron pipe marking the intersection of the west line of Cedar Street and the south line of Chicago Avenue; thence north eighty-nine degrees, forty-three minutes East (N. 89° 43′ E.) one thousand eight hundred and no-tenths (1,800.0) feet along the south line of Chicago Avenue to an iron pipe; thence north sixty-one degrees, fifty-nine minutes east (N. 61° 59′ E.) three hundred sixty-three and no-tenths (363.0) feet to an iron pipe in the west right-of-way line of the Granite City and Madison Belt Line Railroad

Company (Terminal Railroad Association of St. Louis); thence south forty degrees, fifteen and one-half minutes west (S. 40° 15½′ W.) five hundred seventy-five and eight-tenths (575.8) feet along said right-of-way line to an iron pipe; thence south forty-nine degrees, forty-four and one-half minutes east (S. 49° 44½′ E.) fifty and no-tenths (50.0) feet to an iron pipe in the west right-of-way line of The Alton Railroad; thence south forty degrees, fifteen and one-half minutes west (S. 40° 15½′ W.) seven hundred sixty-eight and seven-tenths (768.7) feet along said west right-of-way line to an iron pipe marking the intersection of the west right-of-way line of The Alton Railroad and the center line of Fractional Section 24; thence south eighty-nine degrees, forty-three minutes west (S. 89° 43′ W.) sixty and seven-tenths (60.7) feet along the center line of Fractional Section 24 to an iron pipe; thence south forty degrees, fifteen and one-half minutes west (S. 40° 15½′ W.) eight hundred sixty-eight and two-tenths (868.2) feet to an iron pipe marking the point of curve to the left; thence along said curve to the left having a radius of nine thousand one hundred sixty-seven and eight-tenths (9,167.8) feet a distance of one thousand four hundred ten and eight-tenths (1,410.8) feet to an iron pipe marking the intersection of the west right-of-way line of The Alton Railroad and the north line of U. S. Survey 604; thence south seventy-one degrees, fifty-six minutes east (S. 71° 56′ E.) twenty-nine and eight-tenths (29.8) feet along said right-of-way line of The Alton Railroad and the north line of U. S. Survey 604 to an iron pipe marking the point of curve to the left; thence along said curve to the left having a radius of nine thousand one hundred thirty-eight and eight-tenths (9,138.8) feet a distance of eight hundred twenty-four and no-tenths (824.0) feet to a point; thence north seventy-two degrees, thirty-one and one-half minutes west (N. 72° 31½′ W.) one hundred ten and no-tenths (110.0) feet to a point; thence south seventeen degrees,
8 seven and one-half minutes west (S. 17° 07½′ W.) nine hundred ninety and one-tenth (990.1) feet to an iron pipe marking the point of curve to the left; thence along said curve to the left having a radius of ten thousand five hundred nine and five-tenths (10,509.5) feet a distance of one hundred ninety-five and one-tenth (195.1) feet to an iron pipe being the point of compound curve to the left; thence along said curve to the left having a radius of seven

thousand nine hundred five and one-tenth (7,905.1) feet a distance of one hundred sixty-three and nine-tenths (163.9) feet to an iron pipe in the west line of U. S. Survey 604; thence south thirteen degrees, four minutes west (S. 13° 04′ W.) two thousand one hundred eighty-five and eight-tenths (2,185.8) feet along said west line of U. S. Survey 604 to a point marking the intersection of the west line of U. S. Survey 604 and the center line of Bissell Street in the City of Madison, said point being the southwest corner of U. S. Survey 604; thence south seventy-two degrees, eleven minutes east (S. 72° 11′ E.) twenty-five and eight-tenths (25.8) feet along said center line of Bissell Street and the south line of U. S. Survey 604; thence south seven degrees no minutes west (S. 7° 00′ W.) one thousand two hundred seventeen and six-tenths (1,217.6) feet to an iron pipe marking the intersection of the west right-of-way line of The Alton Railroad and the north right-of-way line of the Merchants Bridge (Terminal Railroad Association of St. Louis); thence north eighty-nine degrees, twenty-one minutes west (N. 89° 21′ W.) six hundred forty-eight and five-tenths (648.5) feet along said north right-of-way line of the Merchants Bridge (Terminal Railroad Association of St. Louis) to an iron pipe marking the point of curve to the left; thence along said curve to the left having a radius of two thousand nine hundred sixty-four and nine-tenths (2,964.9) feet a distance of nine hundred thirty-four and no tenths (934.0) feet to a point; thence south seventy-two degrees, thirty-six minutes west (S. 72° 36′ W.) one thousand two hundred eighty-eight and no tenths (1,288.0) feet, more or less, to a point marking the intersection of the north right-of-way line of the Merchants Bridge (Terminal Railroad Association of St. Louis) and the ordinary high water mark of the Mississippi River; thence, along said ordinary high water mark of the Mississippi River, north ten degrees, forty-nine minutes west (N. 10° 49′ W.) one hundred twelve and three-tenths (112.3) feet; thence north twenty-one degrees, thirty-two and one-half minutes west (N. 21° 32½′ W.) one hundred twenty-two and six-tenths (122.6) feet; thence north no degrees, twenty-nine minutes east (N. 0° 29′ E.) one hundred eighteen and no tenths (118.0) feet; thence north twenty-two degrees, twenty-three minutes west (N. 22° 23′ W.) one hundred sixty-five and five-tenths (165.5) feet; thence north forty-two degrees, twenty-eight minutes west (N. 42° 28′ W.)

eighty and no tenths (80.0) feet; thence north nineteen degrees, twenty-seven minutes west (N. 19° 27′ W.) five hundred seventy-five and five-tenths (575.5) feet; thence north nineteen degrees, twenty-six and one-half minutes west (N. 19° 26½′ W.) two hundred forty-seven and five-tenths (247.5) feet; thence north thirty degrees, thirty-seven and one-half minutes west (N. 30° 37½′ W.) three hundred sixteen and one-tenth (316.1) feet; thence north twenty-eight degrees, twelve and one-half minutes west (N. 28° 12½′ W.) six hundred seven and one-tenth (607.1) feet; thence north twenty-five degrees, forty-two and one-half minutes west (N. 25° 42½′ W.) seven hundred eighty-one and three-tenths (781.3) feet; thence north twenty-nine degrees, twenty-nine minutes west (N. 29° 29′ W.) seven hundred ninety and three-tenths (790.3) feet; thence north forty-seven degrees, twenty-one and one-half minutes west (N. 47° 21½′ W.) four hundred forty-seven and three-tenths (447.3) feet to a point marking the intersection of the ordinary high water mark of the Mississippi River and the thalweg of Cabaret Chute; thence, along said thalweg of Cabaret Chute, north forty-three degrees, fifty-seven minutes east (N. 43° 57′ E.) one hundred thirty and nine-tenths (130.9 feet, more or less; thence north twenty-four degrees, thirty-seven minutes east (N. 24° 37′ E.) one
9 hundred ninety and one-tenth (190.1) feet; thence north forty-one degrees, forty and one-half minutes east (N. 41° 40½′ E.) two hundred nineteen and six-tenths (219.6) feet; thence north one degree, forty-two and one-half minutes east (N. 1° 42½′ E.) two hundred one and one-tenth (201.1) feet; thence north nine degrees, twenty-four minutes west (N. 9° 24′ W.) one hundred forty and nine-tenths (140.9) feet; thence north twenty degrees, eight and one-half minutes west (N. 20° 08½′ W.) two hundred twelve and no tenths (212.0) feet; thence north forty-one degrees, twenty-seven minutes west (N. 41° 27′ W.) two hundred five and five-tenths (205.5) feet; thence north nineteen degrees, twenty-one and one-half minutes west (N. 19° 21½′ W.) three hundred seventy-four and two-tenths (374.2) feet; thence north twenty-two degrees, three minutes west (N. 22° 03′ W.) two hundred fifty-five and seven-tenths (255.7) feet; thence north seven degrees, fifty-nine and one-half minutes west (N. 7° 59½′ W.) four hundred two and eight-tenths (402.8) feet; thence north twelve degrees, twenty-nine and one-half minutes west (N. 12° 29½′

W.) one hundred eighty and three-tenths (180.3) feet; thence north sixteen degrees, fifty-three minutes east (N. 16° 53′ E.) one hundred seventy-five and six-tenths (175.6) feet; thence north five degrees, forty-nine and one-half minutes east (N. 5° 49½′ E.) two hundred forty-six and three-tenths (246.3) feet; thence north nineteen degrees, fifty-nine minutes east (N. 19° 59′ E.) two hundred thirty-four and no tenths (234.0) feet; thence north thirty-seven degrees, one and one-half minutes east (N. 37° 01½′ E.) four hundred fifty-three and three-tenths (453.3) feet; thence north sixty-one degrees, five and one-half minutes east (N. 61° 05½′ E.) two hundred twenty-nine and six-tenths (229.6) feet; thence north seventy-one degrees, fifty-seven minutes east (N. 71° 57′ E.) two hundred eighty and eight-tenths (280.8) feet; thence north sixty-seven degrees, twelve minutes east (N. 67° 12′ E.) one hundred seventy and three-tenths (170.3) feet; thence north fifty-five degrees, one-half minute east (N. 55° 00½′ E.) two hundred seven and five-tenths (207.5) feet; thence north eighty-five degrees, fifty-four minutes east (N. 85° 54′ E.) two hundred twenty-three and six-tenths (223.6) feet; thence north seventy-four degrees, fifty-one minutes east (N. 74° 51′ E.) two hundred thirty-three and no tenths (233.0) feet; thence north forty-five degrees, twelve minutes east (N. 45° 12′ E.) forty-three and one-tenth (43.1) feet; thence north forty-five degrees, eleven and one-half minutes east (N. 45° 11½′ E.) seventy-one and nine-tenths (71.9) feet; thence north forty-one degrees, fifty-four and one-half minutes east (N. 41° 54½′ E.) one hundred sixty-three and nine-tenths (163.9) feet; thence north thirty-two degrees, eleven minutes east (N. 32° 11′ E.) four hundred one and nine-tenths (401.9) feet; thence north twenty-six degrees, fifteen minutes east (N. 26° 15′ E.) two hundred fifteen and four-tenths (215.4) feet; thence north thirty-four degrees, fifty-seven minutes east (N. 34° 57′ E.) one hundred eighty-two and eight-tenths (182.8) feet; thence north twenty-four degrees, three minutes east (N. 24° 03′ E.) two hundred three and seven-tenths (203.7) feet; thence north thirty-one degrees, fifteen and one-half minutes east (N. 31° 15½′ E.) two hundred two and four-tenths (202.4) feet; thence north forty-eight degrees, fifty-six and one-half minutes east (N. 48° 56½′ E.) two hundred five and five-tenths (205.5) feet; thence north eighteen degrees, nine and one-half minutes east (N. 18° 09½′ E.) one hundred ninety-five and eight-

tenths (195.8) feet; thence north thirty-seven degrees, twenty-two minutes east (N. 37° 22′ E.) two hundred seven and six-tenths (207.6) feet; thence north twenty-six degrees, nineteen minutes east (N. 26° 19′ E.) four hundred eight and three-tenths (408.3) feet; thence north nine degrees, twenty-one minutes west (N. 9° 21′ W.) two hundred fifty-two and four-tenths (252.4) feet; thence north thirty-nine degrees, seven and one-half minutes east (N. 39° 07½′ E.) one hundred ninety-three and three-tenths (193.3) feet;

10 thence north fourteen degrees, fifty-five minutes east (N. 14° 55′ E.) two hundred five and nine-tenths (205.9) feet; thence north twenty-five degrees, thirteen minutes east (N. 25° 13′ E.) one hundred seventy-one and three-tenths (171.3) feet; thence north thirty-nine degrees, twenty-five and one-half minutes east (N. 39° 25½′ E.) three hundred eighty-five and eight-tenths (385.8) feet; thence north sixty-one degrees, fifty-nine minutes east (N. 61° 59′ E.) one hundred seventy-six and seven-tenths (176.7) feet; thence north thirty-eight degrees, forty-nine and one-half minutes east (N. 38° 49½′ E.) one hundred five and two-tenths (105.2) feet to a point marking the intersection of the thalweg of Cabaret Chute and the north line of the property being described; thence east two thousand three hundred fifty-three and nine-tenths (2,353.9) feet along said north line to an iron pipe in the east right-of-way line of East Side Levee and Sanitary District; thence south twenty-two degrees, four minutes west (S. 22° 04′ W.) one thousand five hundred forty-one and nine-tenths (1,541.9) feet to an iron pipe marking the intersection of said east right-of-way line of East Side Levee and Sanitary District and the north line of Neidringhaus Avenue; thence north eighty-nine degrees, forty-two and one-half minutes east (N. 89° 42½′ E.) one thousand two hundred two and one-tenth (1,202.1) feet along the north line of Neidringhaus Avenue to the point of beginning, containing one thousand one hundred fifty-two and nine-tenths (1,152.9) acres, more or less.

GRANITE CITY

Neidringhaus Ave

Olive St

Chicago Ave

Cedar St

30" Conc Sewer Pipe

42" Conc Sewer Pipe

Iron Pipe

N 61°59'E 363.0'

S 40°15'½W 760.7'

S 89°43'W 60.7'

72" Conc Sewer Pipe

36" Conc Sewer Pipe

S 40°15'½W 866.2'

R = 9167.8' L = 1410.8'

City Limits of Granite City

City Limits of Madison

S 37°56'E 29.6'

U.S. Survey 604

R = 9158.8'
L = 624.0'

N 72°31'½W 110.0'

S 17°07'½W 990.1'

R = 10,509.5'
L = 185.1'

R = 7495.1'
L = 163.9'

E St Louis & Interurban Water Co.
(48" Conic Pipe)

100' Conic Sewer Pipe

N 85°42'½E 1282.1'

S 22°04'W 154.9'

Existing Levee

Union Electric Co of Illinois
(Transmission Line)

St. Louis & Alton River Road

CABARET

S 22°E 105.2'

76.7'

Fuel Corp Line)

Sewer ...ch)

11523 Acres

Madison

VENICE

Wagner Ave

City Limits of Venice

City Limits of Madison

College Ave

3rd

2nd

S 15°03'W 218.8'

Granite St

S 72°11'E 23.8'

1st

Bissell St

S 7°00'W

(48" Conic Pipe)

100' Conic Sewer

S 22°04'W 154.9'

N 85°42'E

City Limits of Granite City

Existing Levee

Union Electric Co of Illinois
(Transmission Line)

St. Louis & Alton River Road

S 17°07'½W 990.1'

R = 10,509.5'
L = 185.1'

R = 7495.1'
L = 163.9'

College Ave

S 15°03'W 218.8'

S 72°11'E 23.8'

Granite St

Bissell St

S 7°00'W

CABARET

N 38°48'E 105.2'

N 61°59'E 176.7'

N 59°25'½E 365.8'

N 25°15'E 171.9'

N 4°55'E 205.9'

N 59°07'½E 193.5'

N 5°21'W 252.4'

N 26°15'E 400.5'

N 37°22'E 207.6'

N 18°09'E 135.6'

N 40°36'½E 205.5'

N 31°15'½E 202.4'

N 24°03'E 205.7'

N 36°57'E 182.8'

N 26°15'E 215.4'

N 37°11'E 401.9'

N 4°54½'E 163.5'

N 45°11'E 71.9'

N 45°12'E 431.1'

N 74°51'E 223.0'

N 85°54'E 223.6'

N 35°00'½E 207.5'

N 67°12'E 170.5'

N 71°53'E 288.8'

N 60°05'E 229.6'

N 37°01'E 453.5'

N 19°54'E 234.0'

N 5°41'E 246.3'

N 14°55'E 176.6'

N 27°29'W 186.3'

N 7°59'W 402.8'

N 22°03'W 255.7'

N 19°21'W 374.2'

N 61°27'W 205.5'

N 20°08'W 212.0'

N 5°24'W 140.9'

N 4°40'E 219.6'

N 26°57'E 198.1'

N 45°57'E 183.5'

N 67°21'W 44.3'

CHUTE

Thalweg of Cabaret Chute

CABARET ISLAND

Mississippi River Fuel Corp
(10" Gas Pipe Line)

Granite City Sewer
(Paved Open Ditch)

City Limits of Madison

22 | 23
27 | 26

℄ Proposed Levee

Laclede Power & Light Co
(10" Gas Line)

N 25°45½'W 781.3'

N 78°12½'W 607.1'

N 64°57½'W 346.1'

N 18°24½'W 247.5'

Ordinary High Water Mark

MISSISSIPPI RIVER

BY	DATE	
H.L.G.	2-1-43	Iron pipes added at
L.G.	12-21-42	Course of N.W. corner N 61°59'E 176.7 Course of S.W. corn S 12°56'W 1288.0

ENGINEER BRANCH DEPOT

GRANITE CITY, ILLINOIS

LOCATION OF EXISTING UTILITIES

SCALE

ST. LOUIS MISSOURI ENGINEER DISTRICT — SEPTEMBER 1942

SUBMITTED	RECOMMENDED	APPROVED
Thomas J. Gray	A. F. Lawson	W. B. Seagrave
ENGINEER	MAJOR, CORPS OF ENGINEERS	LT. COL., CORPS OF ENGINEERS, DIST. ENGINEER

DRAWN BY D.L.D. — CHECKED BY G.W.K.

BY	DATE	CHARACTER REVISIONS
H.L.G.	2-1-43	Iron pipes added at some property angle points.
L.G.	12-21-42	Course at N.W. corner changed from N. 61°58' E. 176.7' to N. 61°59' E. 176.7'. Course at S.W. corner changed from S. 32°06' W. 1758.9' to S. 72°36' W. 1288.0'.

12 And afterwards, to wit: on the 12th day of November, A. D. 1942, there was filed in the office of the clerk of said court a certain Declaration of Taking No. 1, which said Declaration was and is in the words and figures, following, to wit:

13 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—228) * *

DECLARATION OF TAKING.

To the Honorable, the United States District Court:

I, Henry L. Stimson, Secretary of War of the United States, do hereby declare that:

1. (a) The lands hereinafter described are taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U. S. C. sec. 258a), and acts supplementary thereto and anmendatory thereof, and under the further authority of the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), and April 11, 1918 (40 Stat. 518, 50 U. S. C. sec. 171), which acts authorize the acquisition of land for military purposes, and the Act of Congress approved December 17, 1941 (Public Law 353—77th Congress) which act appropriated funds for such purposes.

(b) The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for the construction of an engineering depot and for other military uses incident thereto. The said lands have been selected by me for acquisition by the United

14 States for use in connection with the establishment of the Granite City Engineer Branch Depot in the County of Madison, State of Illinois, and for such other uses as may be authorized by Congress or by Executive Order, and are required for immediate use.

2. A general description of the lands being taken is set forth in Schedule "A" attached hereto and made a part hereof and is a description of part of the same lands in the petition in the above entitled cause.

3. The estate taken for said public uses is the full fee simple title thereto, subject however to existing easements for public roads and highways, for public utilities, for railroads, and for pipe lines.

4. A plan showing the lands taken is annexed hereto as Schedule "B" and made a part hereof.

5. The sum estimated by me as just compensation for said land, with all buildings and improvements thereon and all appurtenances thereto, and including any and all interests hereby taken in said lands, is set forth in Schedule "A" herein, which sum I cause to be deposited herewith in the Registry of said Court for the use and benefit of the persons entitled hereto. I am of the opinion that the ultimate award for said lands will probably be within any limits prescribed by law as the price to be paid therefor.

In Witness Whereof, the petitioner, by its Secretary of War, thereunto authorized, has caused this declaration to be signed in its name by said Henry L. Stimson, Secretary of War, this the 27th day of October, A. D., 1942, in the City of Washington, District of Columbia.

Henry L. Stimson,
Secretary of War of the United States.

Indorsed, Filed Nov. 12, 192, G. W. Schwaner, Clerk.

15 Schedule "A".

The land which is the subject matter of this Declaration of Taking aggregates 644.30 acres, more or less, situate and being in the County of Madison, State of Illinois. A description of the lands taken, together with a list of the purported owners thereof and a statement of the sum estimated to be just compensation therefor is as follows:

Tract ED-1.

Description:

Land described as follows, being a part of the SE¼ of Sec. 27 and the SW¼ of Sec. 26, T. 3 N., R. 10 W of the 3rd PM in Madison County, Illinois: Starting at the northwest corner of the U. S. Survey 604, thence south 13 degrees 04′ West 4355.8′, thence south 72°11′ E. 25.8′, thence South 7° West 1217.6′, thence North 89°21′ West 1119.5′, thence South 72°36′ West 934.2′ to point of beginning; thence South 72°36′ West 824.7′ plus or minus, thence North 10°49′ West 112.3′, thence North 21°32½′ West 122.6′, thence North 0°29′ East 118.0′ thence North 22°23′ West 165.5′, thence North 42°28′ West 80.0′, thence North 19°27′ West 575.5′, thence North 65°55′ East 892.4′ plus or minus, thence South 15°54′ East 1262.8′ to point of beginning.

Name of purported owner: Madison County Ferry Company.

Address of purported owner: c/o Francis, Perry, Ruth, 110 North Seventh Street, St. Louis, Missouri.

Estimated Compensation: $7,017.00.

Tract ED-4.

Description:

Land described as follows, being a part of Section 26 and 27, Township 3 North, Range 10 West of the 3rd PM in Madison County, Illinois:

Starting at the northwest corner of U. S. Survey 604, thence South 13 degrees 4′ West 3093.3′ to point of beginning; thence South 13 degrees 4′ West 1262.4′ thence South 72 degrees 11′ East 25.8′, thence South 7 degrees West 1217.6′, thence North 89 degrees 21′ West 242.1′ thence North 4 degrees 32½′ West 63.6′, thence North 12 degrees 28′ East 577.3′, thence North 4 degrees 6′ East 266′, thence North 3 degrees 1½′ West 245′, thence South 88 degrees 25′ West 1930.9, thence South 65 degrees 55′ West 1232.2′, plus or minus, thence North 19 degrees 26½′ West 247.5′, thence North 30 degrees 37½′ West 316.1′, thence North 28 degrees 12½′ West 607.1′, thence North 25 degrees 42½′ West 781.3′, thence North 29 degrees 29′ West 790.3′ thence North 47 degrees 21½′ West 447.3′, plus or minus, thence North 43 degrees 57′ East 130.9′, thence North 71 degrees 54′ East 3141.8′, thence North 88 degrees 24½′ East 1163.8′, thence South 3 degrees 33′ West 190.8, thence South 11 degrees 10½′ East 101.3′, thence South 16 degrees 44½′ East 100.2′, thence South 13 degrees 58′ East 100.5′, thence South 14 degrees 3′ East 100.5′, thence South 24 degrees 38′ 16 East 121.9′, thence South 40 degrees 27′ East 105.7′, thence South 40 degrees 47′ East 100.1′, thence South 37 degrees 49½′ East 300.5′, thence South 37 degrees 51½′ East 200.5′, thence South 37 degrees 54′ East 200.5′, thence South 37 degrees 55½′ East 200.3′, thence South 41 degrees 19½′ East 97.9′, thence South 1 degree 19½′ East 169.8′, thence South 4 degrees 34½′ East 234.1′, thence South 76 degrees 56′ East 80′ to point of beginning.

Name of Purported Owner: The Southern Railway Company.

Address of Purported Owner: Washington, D. C.

Estimated Compensation: $55,174.00.

Name of Tenant: W. E. Gant.

Address of Tenant: c/o W. E. Gant Commission Company, National Stock Yards, Illinois.

Tract ED-7.

Description:

Land in Sections 22, 23, 26 and 27 in T. 3 N., R. 10 W. of the 3rd PM in Madison County, Illinois:

Starting at the intersection of the East and West center line of Section 23 with the East line of Section 23, thence South 89 degrees 17 minutes West 2158.1 feet to point of beginning; thence South 9 degrees 11 minutes East 1764 feet, thence South 81 degrees 36 minutes West 15 feet, thence South 7 degrees 35½ minutes East 798.2 feet; thence South 4 degrees 2½ minutes East 126.4 feet, thence South 88 degrees 24½ minutes West 1852.3 feet; thence South 71 degrees 54 minutes West 3141.8 feet, thence North 24 degrees 37 minutes East 190.1 feet, thence North 41 degrees 40½ minutes East 219.6 feet, thence North 1 degree 42½ minutes East 201.1 feet, thence North 9 degrees 24 minutes West 140.9 feet, thence North 20 degrees 8½ minutes West 212 feet thence North 41 degrees 27 minutes West 205.5 feet, thence North 19 degrees 21½ minutes West 374.2 feet, thence North 22 degrees 3 minutes West 255.7 feet, thence North 7 degrees 59½ minutes West 402.8 feet, thence North 12 degrees 29½ minutes West 180.3 feet, thence North 16 degrees 53 minutes East 175.6 feet, thence North 5 degrees 49½ minutes East 246.3 feet, thence North 19 degrees 59 minutes East 234 feet, thence North 37 degrees 1½ minutes East 453.3 feet, thence North 61 degrees 5½ minutes East 229.6 feet, thence North 71 degrees 57 minutes East 280.8 feet, thence North 67 degrees 12 minutes East 170.3 feet, thence North 55 degrees ½ minute East 207.5 feet, thence North 85 degrees 54 minutes East 223.6 feet, thence North 74 degrees 51 minutes East 233 feet, thence North 89 degrees 17 minutes East 3101.2 feet to point of beginning.

Name of Purported Owner: Cool Land Syndicate.

Address of Purported Owner: c/o Mr. F. Pitzman, 615 Chestnut Street, St. Louis, Missouri.

Estimated Compensation: $43,579.00.

17 Names and Addresses of Tenants:

Mr. H. Onstott, 1456 Cleveland Avenue, East St. Louis, Illinois,

Mr. C. H. Knebel, 1147 Broadway, Highland, Illinois,

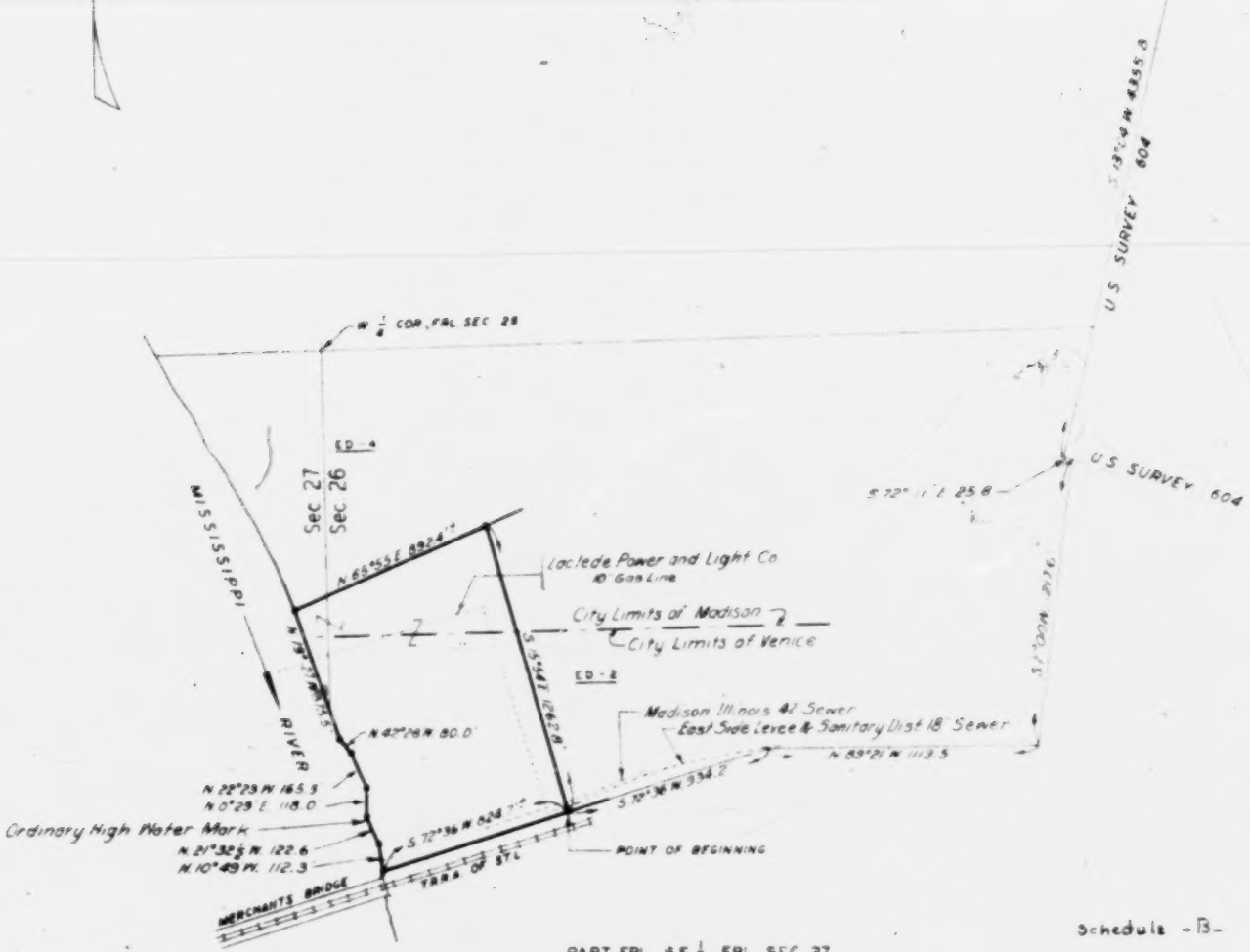
Mr. Kiro Naumoff, 1245 Niedringhaus Avenue, Granite City, Illinois,

Mr. Robert Brady, Box 437, Venice, Illinois.

The gross sum estimated to be just compensation for the lands hereby taken in $105,770.00.


STONE
WITNESS POINT
NW COR. U.S SURVEY 604
U.S SURVEY 604
N
U.S SURVEY 604
S 13° 04' W 4355.0
U.S SURVEY 604
S 72° 41' E 25.8
U.S SURVEY 604
S 7° 04' W 1215.6
W ¼ COR. FRL SEC 26
ED-4
Sec 27
Sec 26
MISSISSIPPI
RIVER
N 83°45' E 892.4'
Laclede Power and Light Co
10' Gas Line
City Limits of Madison
City Limits of Venice
ED-3
S 59°41' W 1262.6
N 42°24' W 80.0'
N 22°23' W 165.5
N 0°29' E 118.0
Ordinary High Water Mark
N 21°32½' W 122.6
N 10°49' W 112.3
S 72°36' W 824.7'
Madison Illinois 42 Sewer
East Side Levee & Sanitary Dist 18 Sewer
N 89°21' W 1113.5
S 12°34' W 234.2'
POINT OF BEGINNING
MERCHANTS BRIDGE
TERRA CE STL

Schedule -B-



Schedule -B-

PART FRL SE ¼, FRL SEC 27
AND
PART FRL SW ¼, FRL SEC 28

LYING WITHIN CORPORATE LIMITS OF MADISON AND VENICE
TWP 3N, R10W OF THE 3RD P M
MADISON COUNTY, ILLINOIS

INTEREST TO BE ACQUIRED — FEE SIMPLE

REPUTED OWNER MADISON COUNTY FERRY COMPANY
AREA OF TRACT 23.39 ACRES

ENGINEER BRANCH DEPOT
LAND ACQUISITION

TRACT NO ED-1

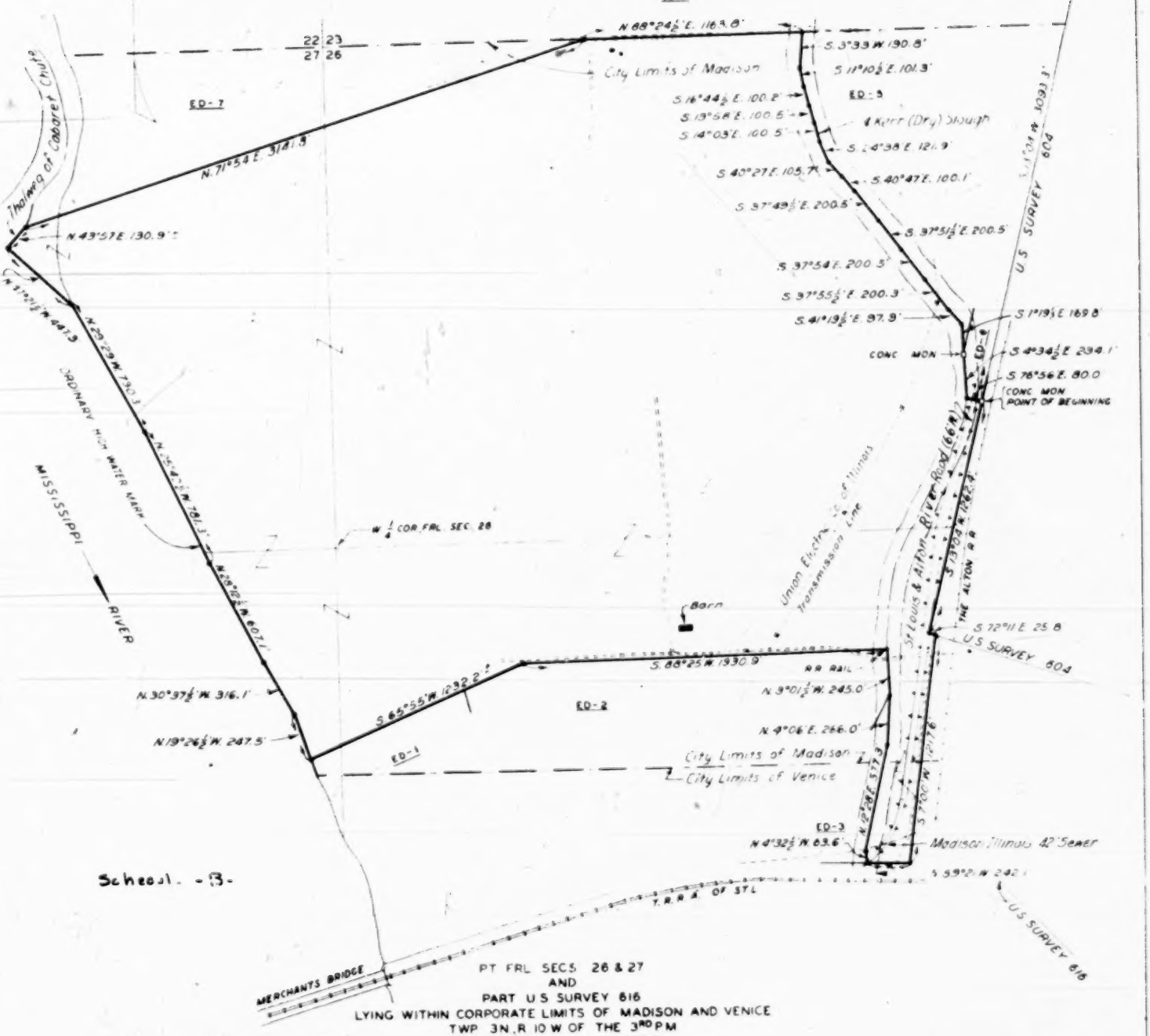
SCALE 1 4800

400 0 400 800

ST LOUIS MISSOURI ENGINEER DISTRICT JUNE 1942

SUBMITTED [signature] APPROVED [signature]

I certify that this is an accurate map of Tract ED-1 based on FIELD SURVEY & DEED DESCRIPTION which shows this tract to contain 23.39 acres
Name [signature]
Title [signature]



PT FRL SECS 26 & 27
AND
PART U S SURVEY 816
LYING WITHIN CORPORATE LIMITS OF MADISON AND VENICE
TWP 3N, R 10 W OF THE 3RD P M
MADISON COUNTY, ILLINOIS

INTEREST TO BE ACQUIRED – FEE SIMPLE

REPUTED OWNER SOUTHERN RAILWAY COMPANY
AREA OF TRACT 302 27 ACRES

ENGINEER BRANCH DEPOT
LAND ACQUISITION

TRACT NO ED-4

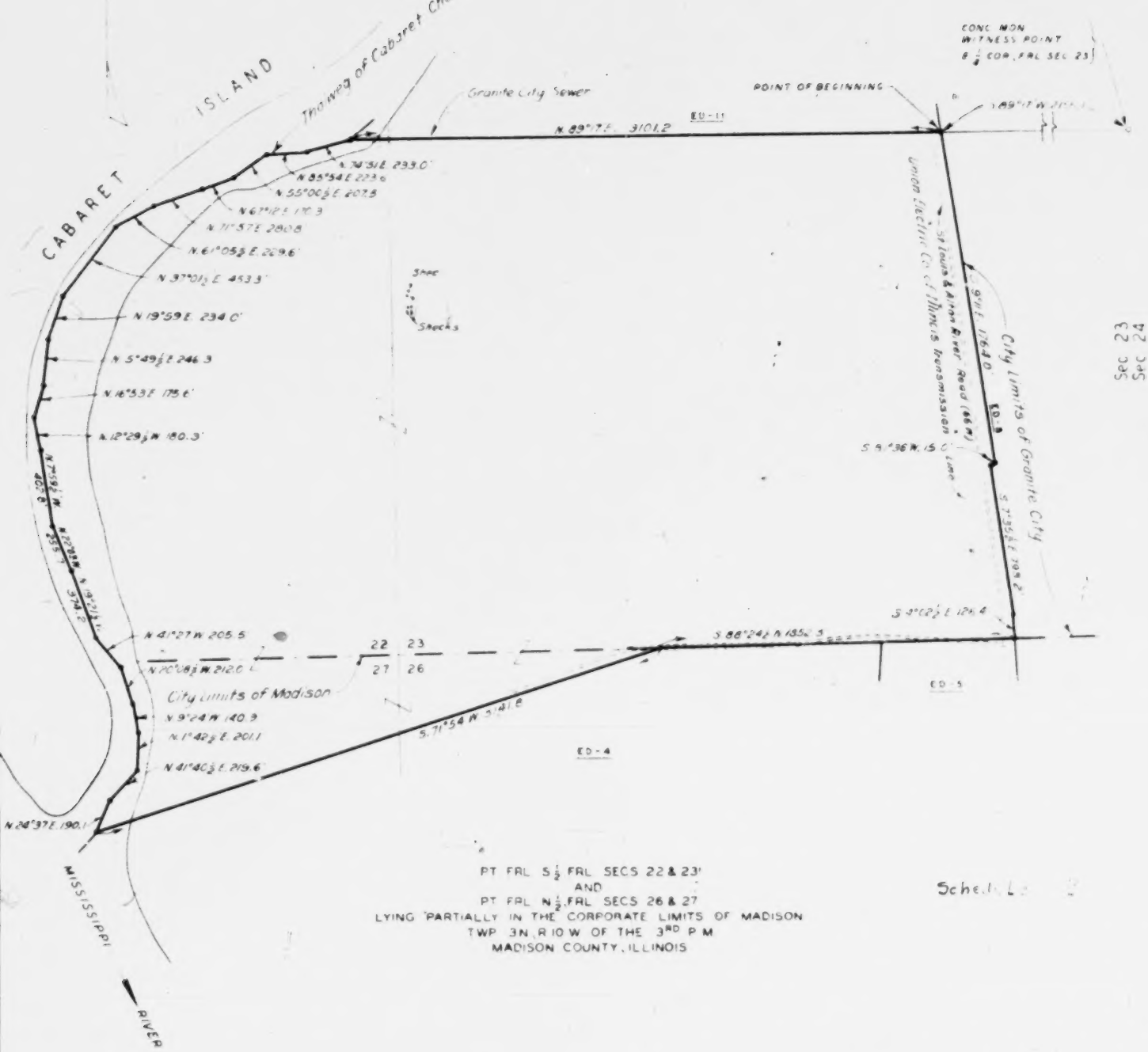
SCALE 1 INCH

400 0 400 800

I certify that this is an accurate map of Tract ED-4 based on FIELD SURVEY & DEED DESCRIPTION which shows this tract to contain 302.27 acres

ST LOUIS MISSOURI ENGINEER DISTRICT JUNE 1942

SUBMITTED _____ APPROVED _____



PT FRL S½ FRL SECS 22 & 23
AND
PT FRL N½ FRL SECS 26 & 27
LYING PARTIALLY IN THE CORPORATE LIMITS OF MADISON
TWP 3N R 10 W OF THE 3RD P M
MADISON COUNTY, ILLINOIS

Schedule 2

INTEREST TO BE ACQUIRED – FEE SIMPLE

REPUTED OWNER COOL LAND SYNDICATE

AREA OF TRACT 318.84 ACRES

I certify that this is an accurate map of Tract ED-7 based on the Survey, Deed Description & Plat

ENGINEER BRANCH DEPOT
LAND ACQUISITION

TRACT NO ED-7

SCALE 1 400

400 0 400 800

ST LOUIS MISSOURI ENGINEER DISTRICT JUNE 1942

21 And afterwards, to wit: on the 12th day of November, A. D. 1942, the following further proceedings were had in said court in said case and were entered of record, to wit:

22 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—228) * *

JUDGMENT ON FIRST DECLARATION OF TAKING.

This cause coming on for hearing upon motion of Howard L. Doyle, United States Attorney in and for the Southern District of Illinois, Attorney for the Petitioner herein, for a Judgment on the Declaration of Taking filed herein, and now upon due consideration thereof, and of the Petition and Declaration of Taking filed herein, and the Statutes in such case made and provided, and it appearing to the satisfaction of the Court:

First: That the United States of America is entitled to acquire property by condemnation under judicial process for the purposes as set forth and prayed in said petition;

Second: That the Declaration of Taking filed herein contains or has annexed thereto a statement of the authority under which, and the public use for which, the lands hereinafter described are taken, a description of said lands sufficient for the identification thereof, a statement of the estate of interest taken for said public use, a plat showing the lands taken, and a statement of the sum of money estimated by the Secretary of War to be just compensation for the lands taken, to-wit $105,770.00 and

23 that the said sum of money has been deposited in the Registry of this court for the use and benefit of the persons entitled thereto;

Third: That the said Declaration of Taking filed herein contains a statement that the Secretary of War, the head of the acquiring agency, is of the opinion that the ultimate award of just compensation will be within the limits prescribed by Congress as the price to be paid therefor.

Now, Therefore, It Is Ordered, Adjudged And Decreed that the title to the said lands in fee simple absolute, and together with the buildings and improvements thereon and the appurtenances thereunto appertaining, subject only to

existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, veseted in the United States of America upon the filing of the said Declaration of Taking and the depositing in the Registry of this Court of the amount of estimated just compensation, to-wit, the sum of $105,770.00, which said lands are described as follows:

Tract ED-1: Land described as follows, being a part of the SE¼ of Sec. 27 and the SW¼ of Sec. 26, T. 3 N., R. 10 W of the 3rd PM in Madison County, Illinois:

Starting at the northwest corner of the U. S. Survey 604, thence South 13 degrees 04′ West 4355.8′, thence south 72°11′ E. 25.8′, thence South 7° West 1217.6′, thence North 89° 21′ West 1119.5′, thence South 72°36′ West 934.2′ to point of beginning; thence South 72°36′ West 824.7′ plus or minus, thence North 10°49′ West 112.3′, thence North 21°32½′ West 122.6′, thence North 0°29′ East 118.0′, thence North 22°23′ West 165.5′, thence North 42°28′ West 80.0′, thence North 19°27′ West 575.5′, thence North 65°55′ East 892.4′ plus or minus, thence South 15°54′ East 1262.8′ to point of beginning.

Tract ED-4: Land described as follows, being a part of Section 26 and 27, Township 3 North, Range 10 West of the 3rd PM in Madison County, Illinois:

Starting at the northwest corner of U. S. Survey 604, thence South 13 degrees 4′ West 3093.3′ to point of beginning; thence South 13 degrees 4′ West 1262.4′ thence South 72 degrees 11′ East 25.8′, thence South 7 degrees West 1217.6′, thence North 89 degrees 21′ West 242.1′ thence North 4 degrees 32½′ West 63.6′, thence North 12 degrees 28′ East 577.3′, thence North 4 degrees 6′ East 266′, thence North 3 degrees 1½′ West 245′, thence South 88 degrees 25′ West 1930.9′, thence South 65 degrees 55′ West 1232.2′, plus or minus, thence North 19 degrees 26½′ West 247.5′, thence North 30 degrees 37½′ West 316.1′, thence North 28 degrees 12½′ West 607.1′, thence North 25 degrees 42½′ West 781.3′, thence North 29 degrees 29′ West 790.3′, thence North 47 degrees 21½′ West 447.3′, plus or minus, thence North 43 degrees 57′ East 130.9′, thence North 71 degrees 54′ East 3141.8′, thence North 88 degrees 24½′ East 1163.8′, thence South 3 degrees 33′ West 190.8, thence South 11 degrees 10½′ East 101.3′, thence South 16 degrees 44½′ East 100.2′, thence South 13 degrees 58′ East 100.5′, thence South 14 degrees 3′ East 100.5′,

thence South 24 degrees 38′ East 121.9′, thence South 40 degrees 27′ East 105.7′, thence South 40 degrees 47′ East 100.1′, thence South 37 degrees 49½′ East 300.5′, thence South 37 degrees 51½′ East 200.5′, thence South 37 degrees 54′ East 200.5′, thence South 37 degrees 55½′ East 200.3′, thence South 41 degrees 19½′ East 97.9′, thence South 1 degree 19½′ East 169.8′, thence South 4 degrees 34½′ East 234.1′, thence South 76 degrees 56′ East 80′ to point of beginning.

Tract ED-7: Land in Sections 22, 23, 26 and 27 in T. 3 N., R. 10 W. of the 3rd PM in Madison County, Illinois:

Starting at the intersection of the East and West center line of Section 23 with the East line of Section 23, thence South 89 degrees 17 minutes West 2158.1 feet to point of beginning; thence South 9 degrees 11 minutes East 1764 feet, thence South 81 degrees 36 minutes West 15 feet, thence South 7 degrees 35½′ minutes East 798.2 feet; thence South 4 degrees 2½ minutes East 126.4 feet, thence South 88 degrees 24½ minutes West 1852.3 feet; thence South 71 degrees 54 minutes West 3141.8 feet, thence North 24 degrees 37 minutes East 190.1 feet, thence North 41 degrees 40½′ east 219.6 feet, thence North 1 degree 42½ minutes East 201.1 feet, thence North 9 degrees 24 minutes West 140.9 feet, thence North 20 degrees 8½ minutes West 212 feet thence North 41 degrees 27 minutes West 205.5 feet, thence North 19 degrees 21½ minutes West 374.2 feet, thence North 22 degrees 3 minutes West 255.7 feet, thence North 7 degrees 59½ minutes West 402.8 feet, thence North 12 degrees 29½ minutes West 180.3 feet, thence North 16 degrees 53 minutes East 173.6 feet, thence North 5 degrees 49½ minutes East 246.3 feet, thence North 19 degrees 59 minutes East 234 feet, thence North 37 degrees 1½ minutes East 453.3 feet, thence North 61 degrees 5½ minutes East 229.6 feet, thence North 71 degrees 57 minutes East 280.8 feet, thence North 67 degrees 12 minutes East 170.3 feet, thence North 55 degrees ½ minute East 207.5 feet, thence North 85 degrees 54 minutes East 223.6 feet, thence North 74 degrees 51 minutes East 233 feet, thence North 89 degrees 17 minutes East 3101.2 feet to point of beginning.

and that said lands are now deemed to have been condemned and taken for the United States of America, and the right to just compensation for the same is now vested in the persons entitled thereto; and the amount of such just compensation shall be ascertained and awarded in

this proceeding and established by judgment herein pursuant to law.

25 It further appearing to the Court that by order duly entered herein on March 31, 1942, the petitioner herein, United States of America, was granted the right to the possession of the said tracts of land, and each and every part thereof, as of, to-wit, March 31, 1942.

Now Therefore, It Is Further Ordered, Adjudged And Decreed that the possession of said lands, and each and every part thereof, be and the same is hereby confirmed in the said United States of America, the petitioner herein, and this cause is held open for such further and other orders, judgments and decrees as may be necessary and proper in the premises.

Entered this 12th day of November, A. D. 1942, at Springfield, Illinois.

By the Court.

Chas. G. Briggle,
Judge United States District Court,
Southern District of Illinois.

Indorsed, Filed Nov. 12, 1942. G. W. Schwaner, Clerk.

26 And afterwards, to wit: on the 8th day of February, A. D. 1943, the following further proceedings were had in said court in said case and were entered of record, to wit:

27 In the District Court of the United States.

* * (Caption—228) * *

MOTION TO AMEND PETITION.

Comes now the Petitioner, the United States of America, by Howard L. Doyle, United States Attorney for the Southern District of Illinois, and G. R. Schwarz, Special Attorney, Department of Justice, and represents unto the Court as follows:

1. That heretofore on the 31st day of March, 1942, the petition herein was filed seeking to condemn certain lands which were described in Exhibit "A" atnd shown and delineated on the plat marked Exhibit "B" attached to said petition.

2. That subsequent to the filing of the petition a detailed and careful survey has been made of the premises sought to be taken in this action and that for the convenience of the Court and the parties to this cause of action it is necessary and advantageous to amend the said petition by striking therefrom Exhibit "A" and Exhibit "B" and inserting in lieu thereof a New Exhibit "A", which contains a detailed metes and bounds description of the lands herein sought to be taken and by attaching thereto a New Exhibit "B", which is a detailed map of the lands described in New Exhibit "A".

28 Wherefore, Petitioner requests that it may be permitted to amend its petition as above set out.

Respectfully submitted,
United States of America,
Petitioner.
By (Signed) Howard L. Doyle,
United States Attorney,
(Signed) G. R. Schwarz,
Special Attorney Department of Justice.

ORDER.

This cause coming on to be heard upon the above and foregoing motion and it appearing to the Court that the motion is well founded and should be allowed, It Is Therefore Ordered, Adjudged And Decreed By The Court that the Petitioner be permitted to amend its petition herein heretofore filed by striking from the said petition Exhibit "A" and inserting in lieu thereof New Exhibit "A", and by striking from the said petition Exhibit "B" and inserting in lieu thereof New Exhibit "B"; the said petition in all other respects to remain the same.

Enter:

J. Leroy Adair,
Judge Presiding.

Indorsed, Filed Feb. 8, 1943. G. W. Schwaner, Clerk.

29 And afterwards, to wit: on the 2nd day of August, A. D. 1943, the following further proceedings were had in said court in said case and were entered of record, to wit:

30 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—228) * *

ORDER OF PUBLICATION.

Comes now the Petitioner, the United States of America, by Howard L. Doyle, United States Attorney, and G. R. Schwarz, Special Attorney, Department of Justice, and moves the Court for an order authorizing it to secure service of process by publication on the Defendants named in the affidavits heretofore filed and the unknown owners of all Defendants who may have, or claim to have, an interest in the real estate herein sought to be condemned, and now the Court after being sufficiently advised in the premises, and the examination of the affidavits herein filed orders that the Defendants and the unknown owners named in the affidavits be notified of the pendency of this action by publication in the Edwardsville Intelligencer, a secular newspaper of general circulation, published in the City of Edwardsville in Madison County, Illinois, as provided by the Statutes of the State of Illinois.

Enter:

Chas. G. Briggle,
Judge Presiding.

Indorsed, Filed Aug. 2, 1943, G. W. Schwaner, Clerk.

31 And afterwards, to wit: on the 7th day of October, A. D. 1943, there was filed in the office of the clerk of said court, a certain Motion to Vacate Judgment and to Dismiss, which said Motion was and is in the words and figures, following, to wit:

32 IN THE DISTRICT COURT OF THE UNITED STATES.
* * (Caption—228) * *

MOTION TO VACATE JUDGMENT AND TO DISMISS.

Defendants Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees under deed dated February 1, 1921, and recorded in the Public Records of Madison County, Illinois, in Book 471, at Page 621, commonly known as the Cool Land Syndicate, move the Court to vacate the judgment as to Tract No. 7 entered herein on November 12, 1942 and to dismiss the petition for condemnation heretofore filed in the above entitled cause, and for grounds for their said motion state:

1. Said petition for condemnation fails to set forth the purpose for which the property described in the exhibit attached thereto, and more specifically Tract No. 7 thereof, is sought to be taken, as provided in Section 2 of Chapter 47 of the Illinois Revised Statutes, 1941.

2. Said petition for condemnation fails to set forth or allege that the Secretary of War has made any finding or determination that the land described in the exhibit to said petition, and particularly Tract No. 7, thereof, is needed for any one or more or all of the purposes for which condemnation is authorized by the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518, 50 U. S. C., Section 171).

33 3. Said petition for condemnation fails to set forth or allege that the Secretary of War has requested the Attorney General of the United States to institute proceedings to acquire the land described in the exhibit to said petition, and particularly Tract No. 7 thereof, for any one or more or all of the purposes for which condemnation is authorized by the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518, 50 U. S. C., Section 171).

4. Defendants state, on information and belief, that the actual purpose for which the land described in the exhibit to said petition, and particularly Tract No. 7 thereof, was sought to be taken and is actually being used, is as a site for the construction and operation of a branch depot, which

is not one of the purposes for which condemnation proceedings may be instituted under said Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518, 50 U. S. C., Section 171).

R. H. McRoberts,
1630 Boatmen's Bank Bldg.,
St. Louis, Mo.,
George D. Burroughs,
Edwardsville, Illinois,
Attorneys for Defendants Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees.

Bryan, Williams, Cave & McPheeters,
Warnock, Williamson & Burroughs,
Of Counsel.

Indorsed, Filed Oct. 7, 1943, G. W. Schwaner, Clerk.

34 And afterwards, to wit: on the 17th day of November, A. D. 1943, the following further proceedings were had in said court in said case and were entered of record, to wit:

35 In the District Court of the United States.

* * (Caption—228) * *

Wednesday, November 17, 1943.

Court met pursuant to adjournment.

Present, the Honorable Charles G. Briggle, Judge.

This cause coming on this day to be heard upon the motion of defendants, Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees under deed dated February 1, 1921, to dismiss the petition herein as to Tract No. ED-7, the said defendants by their attorney move the court for leave to amend their motion on the face thereof by making certain interlineations, and the court having duly considered the said motion and being fully advised in the premises, it is ordered by the court that the said

motion be and is hereby allowed, and said amendments being made the plaintiff herein by its attorney makes a cross-motion for leave to amend the petition herein by adding a paragraph designated as IIIA and the court having duly considered the said cross-motion and being fully advised in the premises, it is ordered by the court that the said cross-motion be and is hereby allowed and the said amendment to the petition being filed, on motion of the defendants Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees under deed dated February 1, 1921, it is ordered by the court that leave be and is hereby given the said defendants to plead to the said petition as amended by November 22, 1943.

36 And afterwards, to wit: on the 17th day of November, A. D. 1943, there was filed in the office of the clerk of said court, a certain Amendment to Petition for Condemnation, which said Amendment was and is in the words and figures, following, to wit:

37 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—228) * *

AMENDMENT TO PETITION FOR CONDEMNATION.

Now comes the United States of America, Petitioner herein, by Howard L. Doyle, United States Attorney, and G. R. Schwarz, Special Attorney, and leave of Court having first been had and obtained, amends the original petition herein in the following respects, that is to say: By inserting, following Paragraph III of said original petition, an additional paragraph designated as Paragraph III-A, and reading as follows:

"III-A.

That said lands are being taken in this proceeding for the following purposes, to wit, the site, location, construction and prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds, and the manufacture of explosives and other munitions of war, and for the development and trans-

mission of power for the operation of such plants, pursuant to the determination of the said Secretary of
38 War that said lands are necessary and essential for such purposes, as is set forth in said letter of said Secretary of War, dated March 26, 1942, a certified copy of which said letter is duly filed herein simultaneously with the filing of this amendment to this petition, and is by this reference thereto incorporated herein the same as though it were set forth in full herein."

United States of America,
Petitioner,
By Howard L. Doyle,
United States Attorney,
G. R. Schwarz,
Special Attorney.

Indorsed, Filed Nov. 17, 1943. G. W. Schwaner, Clerk.

39 And afterwards, to wit: on the 17th day of March, A. D. 1943, there was filed in the office of the clerk of said court, a certain certified copy of a letter from the Secretary of War, which said letter was and is in the words and figures, following, to wit:

40 UNITED STATES OF AMERICA.

Department of Justice.

March 27, 1942.

Pursuant to Title 28, Section 661, U. S. Code (Sec. 882, Revised Statutes), I Hereby Certify that the Annexed Paper Is a True Copy of the Original Record in This Department, of a letter dated March 26, 1942, from the Honorable Henry L. Stimson, Secretary of War, to the Attorney General, requesting that a condemnation proceeding be instituted for the acquisition of 1113 acres of land in Madison County, Illinois, for use in the establishment of the Granite City Engineer Branch Depot, Granite City, Illinois.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Department of Justice to be affixed, on the day and year first above written.

(Signed) Norman M. Littell,
(Seal) *Assistant Attorney General.*

41 Granite City Engineer Branch Depot, Ill.

U. S. *vs.* Terminal Railroad Assn. of St. Louis, et al.

March 26, 1942.

The Honorable, The Attorney General,
Washington, D. C.

Dear Mr. Attorney General:

It is necessary that certain land located and situated in Madison County, Illinois, be acquired by the United States for use in the establishment of the Granite City Engineer Branch Depot, Granite City, Illinois.

Therefore, pursuant to the provisions contained in the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518; 50 U. S. C. sec. 171), which Act authorizes the acquisition of land for military purposes, and the Act of Congress approved December 17, 1941 (Public Law 353—77th Congress), which Act appropriated funds for such purposes, it is requested that you cause the necessary proceedings to be instituted for the condemnation of the fee simple title to the land referred to above, subject however to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines. The acquisition involves approximately 1,113 acres of land in Madison County, Illinois. The land is described in the inclosed Exhibit "A" and defined on the inclosed map entitled Exhibit "B".

You are advised that the above mentioned land is necessary to provide adequately for the establishment of a supply depot and for related military purposes. You are also advised that it is vital to the successful prosecution of the war that this project be expedited with the utmost haste and that the United States be given the immediate right to the possession and use of the land, the buildings and improvements thereon, and the appurtenances thereto. Consequently, it is requested that you cause the necessary action to be taken to procure an order from the Court granting immediate possession and use pursuant to the provisions of 50 U. S. C. sec. 171.

The Act of Congress approved December 17, 1941 (Pub-

lic Law 353—77th Congress), supra, appropriated funds to acquire the land under consideration.

42 This Department is negotiating for the procurement of title evidence on the above mentioned land, and you will be advised as soon as arrangements have been made.

The names of some of the parties claiming an interest in the land are shown on exhibit "B". Five additional copies of Exhibit "A" and five adidtional copies of Exhibit "B" are also inclosed.

Sincerely yours,
(Signed) Henry L. Stimson,
Secretary of War.

2 Incls.
Exh. "A" (insext.)
Exh. "B" (insext.)

Indorsed, Filed Mar. 17, 1943. G. W. Schwaner, Clerk.

43 And afterwards, to wit: on the 22nd day of November, A. D. 1943, there was filed in the office of the clerk of said court, a certain Amended Motion to Vacate Judgment and to Dismiss, which said Amended Motion was and is in the words and figures, following, to wit:

44 In the District Court of the United States.
* * (Caption—228) * *

AMENDED MOTION TO VACATE JUDGMENT AND TO DISMISS.

Defendants Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees under deed dated February 1, 1921, and recorded in the Public Records of Madison County, Illinois, in Book 471, at Page 621, commonly known as the Cool Land Syndicate, move the Court to vacate the judgment as to Tract No. 7 entered herein on November 12, 1942, and to dismiss the petition for condemnation heretofore filed in the above entitled cause, as amended on November 17, 1943, and for grounds for their said motion state:

1. Said petition for condemnation, so amended, sets

forth the purpose for which the property described in the exhibit attached thereto, and more specifically Tract No. 7 thereof, is sought to be taken, as being "for use in the establishment of the Granite City Engineer Branch Depot, Granite City, Illinois" and "for the establishment of a supply depot and for related military purposes." Such purpose or purposes do not constitute one or more of the purposes for which condemnation proceedings may be instituted under said Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Con-
45 gress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518, 50 U. S. C., Section 171), and hence said petition shows on its face that petitioner is without any right, power or authority to institute or prosecute condemnation proceedings under the said Act for such purpose or purposes, that the suit cannot be maintained, that the Court has no jurisdiction over the subject matter of the action and had no jurisdiction to make or enter the judgment, particularly as to Tract No. 7, made and entered herein on November 12, 1942, and that the petition and proceedings should be dismissed.

2. Said petition for condemnation, so amended, fails to set forth or allege that the Secretary of War has made any finding or determination that the land described in the exhibit to said petition, and particularly Tract No. 7 thereof, is needed for any one or more or all of the purposes for which condemnation is authorized by the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Act of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518, 50 U. S. C., Section 171), but, on the contrary, specifically shows that the Secretary of War has made a finding or determination that the said land is needed for a purpose or purposes other than those specified in the said Act.

3. Said petition for condemnation, so amended, fails to set forth or allege that the Secretary of War has requested the Attorney General of the United States to institute proceedings to acquire the land described in the exhibit to said petition, and particularly Tract No. 7 thereof, for any one or more or all of the purposes for which condemnation is authorized by the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241) and April 11, 1918 (40 Stat. 518, 50 U. S. C., Section 171), but, on the

contrary, specifically shows that the Secretary of War
46 has requested the Attorney General to institute such proceedings for a purpose or purposes other than those specified in the said Act.

R. H. McRoberts,
R. H. McRoberts,
1630 Boatmen's Bank Building,
St. Louis, Missouri,
George D. Burroughs,
George D. Burroughs,
Edwardsville, Illinois,
Attorneys for Defendants Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees.
Bryan, Williams, Cave & McPheeters,
Bryan, Williams, Cave & McPheeters,
Warnock, Williamson & Burroughs,
Warnock, Williamson & Burroughs,
Of Counsel.

Indorsed, Filed Nov. 22, 1943. G. W. Schwaner, Clerk.

47 And afterwards, to wit: on the 30th day of November, A. D. 1943, the following further proceedings were had in said court in said case and were entered of record, to wit:

48 In the District Court of the United States.

* * (Caption—218) * *

Tuesday, November 30, 1943.

Court met pursuant to adjournment.

Present, the Honorable Charles G. Briggle, Judge.

Come now the parties to this cause by their respective attorneys, and the court having heretofore heard the arguments of said attorneys on the amended motion of Daniel K. Catlin, et al., to vacate the judgment and to dismiss the petition herein as amended re: Tract No. ED7, and now being fully advised in the premises, it is ordered by the court that the said amended motion be and is hereby denied.

49 And afterwards, to wit: on the 9th day of December, A. D. 1943, there was filed in the office of the clerk of said court, a certain Notice of Appeal which said Notice of Appeal was and is in the words and figures, following, to wit:

50 IN THE DISTRICT COURT OF THE UNITED STATES,

Southern District of Illinois,

Southern Division.

United States of America, *Petitioner,* *vs.* 1,113 Acres of Land, More or Less, Situate in Madison County, Illinois, and Commonwealth Steel Company, a Corporation, *et al.*, *Defendants.*	Civil No. 228.

NOTICE OF APPEAL.

Notice Is Hereby Given That Defendants Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees under deed dated February 1, 1921, and recorded in the Public Records of Madison County, Illinois, in Book 471, at Page 621, commonly known as the Cool Land Syndicate, hereby appeal to the United States Circuit Court of Appeals for the Seventh Circuit from

(a) the judgment on declaration of taking made and entered in the above entitled proceedings on November 12, 1942, and more particularly each and every part thereof which relates to or affects, directly or indirectly, the lands owned by said defendants Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees as aforesaid, said lands being in said judgment referred to as Tract No. 7, and

(b) the judgment and order made and entered in the above entitled proceedings on November 30, 1943, overruling and denying the amended motion to vacate judgment and to dismiss of said defendants Daniel K. Catlin, Fred-

erick Pitzman and Lewis M. Rumsey, Jr., as Trustees as aforesaid.

R. H. McRoberts,
R. H. McRoberts,
1630 Boatmen's Bank Building,
St. Louis, Missouri,
Geo. D. Burroughs,
Geo. D. Burroughs,
Bank of Edwardsville Building,
Edwardsville, Illinois,
Attorneys for Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees under deed dated February 1, 1921, and recorded in the Public Records of Madison County, Illinois, in Book 471, at Page 621, commonly known as the Cool Land Syndicate.

Bryan, Williams, Cave & McPheeters,
Warnock, Williamson & Burroughs.

Indorsed, Filed Dec. 9, 1943. G. W. Schwaner, Clerk.

51 And afterwards, to wit: on the 27th day of December, A. D. 1943, there was filed in the office of the clerk of said court, a certain Statement of Points on Appeal which said Statement was and is in the words and figures following, to wit:

52 In the District Court of the United States.

* * (Caption—228) * *

STATEMENT OF POINTS ON APPEAL.

Now come Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees under deed dated February 1, 1921, and recorded in the Public Records of Madison County, Illinois, in Book 471, at Page 621, commonly known as the Cool Land Syndicate, and, pursuant to Rule 75(d) of the Rules of Civil Procedure for the District Courts of the United States and Rule 9 of the Rules of the United States Circuit Court of Appeals, file this Statement of Points on Appeal from the judgment on declaration of taking made and entered in the above entitled proceedings on November 12, 1942, and the judgment and order made and entered on November 30, 1943, over-

ruling and denying the Amended Motion to Vacate Judgment and to Dismiss. Said points are as follows:

1. The Court erred in making and entering on November 12, 1942, the judgment on Declaration of Taking No. 1, and more particularly in making and entering each and every part thereof which relates to or affects, directly or indirectly, the lands owned by defendants Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees as aforesaid, said lands being in said judgment referred to as Tract No. 7.

53 2. The Court erred in making and entering on November 30, 1943, the judgment and order overruling and denying the Amended Motion to Vacate Judgment and to Dismiss of defendants Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees as aforesaid and in failing and refusing to grant and sustain said motion.

Dated December 24th, 1934.

Daniel K. Catlin,
Frederick Pitzman,
Lewis M. Rumsey, Jr.,
As Trustees under deed dated February 1, 1921, and recorded in the Public Records of Madison County, Illinois, in Book 471, at Page 621, commonly known as the Cool Land Syndicate,

By R. H. McRoberts,
R. H. McRoberts,
1630 Boatmen's Bank Building,
St. Louis, Missouri,

By Geo. D. Burroughs,
Geo. D. Burroughs,
Bank of Edwardsville Building,
Edwardsville, Illinois,
Their Attorneys.

Byran, Williams, Cave & McPheeters,
Byran, Williams, Cave & McPheeters,
1630 Boatmen's Bank Building,
St. Louis, Missouri.
Warnock, Williamson & Burroughs,
Warnock, Williamson & Burroughs,
Bank of Edwardsville Building,
Edwardsville, Illinois.

Certificate of Service.

I hereby certify that I have this day served the foregoing Statement of Points on Appeal upon the United States of America, petitioner, by mailing a copy thereof, properly addressed, to Howard L. Doyle, United States Attorney, Federal Building, Springfield, Illinois, and to G. R. Schwarz, Special Attorney, Department of Justice, Jerseyville, Illinois.

Dated at Edwardsville, Illinois, this 24th day of December, 1943.

Geo. D. Burroughs,
Attorney for Defendants Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees.

Indorsed, Filed Dec. 27, 1943, G. W. Schwaner, Clerk.

54 And afterwards, to wit: on the 27th day of December, A. D. 1943, there was filed in the office of the clerk of said court, a certain Designation of Portions of the Record and Proceedings to be Included in the Record on Appeal, which said Designation was and is in the words and figures, following, to wit:

55 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—228) * *

DESIGNATION OF PORTIONS OF THE RECORD AND PROCEEDINGS TO BE INCLUDED IN THE RECORD ON APPEAL.

To the Clerk of said Court:

You are hereby requested, pursuant to Rule 75(a) of the Rules of Civil Procedure for the District Courts of the United States, to include in the record on appeal the following portions of the record and proceedings:

1. Petition for Condemnation filed herein on March 31, 1942.

2. Declaration of Taking No. 1 filed herein on November 12, 1942.

3. Judgment on Declaration of Taking made and entered herein on November 12, 1942.

4. Order of pubilcation made and entered herein on August 2, 1943.

5. Order made and entered herein on September 17, 1943, granting motion of defendants Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees, for twenty days additional time in which to plead.

6. Motion to Vacate Judgment and to Dismiss filed herein by defendants Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees, on October 7th, 1943, as amended by interlineation on November 17, 1943.

56 7. Order made and entered herein on November 17, 1943, granting petitioner leave to amend petition.

8. Amendment to Petition for Condemnation filed herein on November 17, 1943, together with copy of letter of Secretary of War dated March 26, 1942, filed with said amendment.

9. Order made and entered herein on November 17, 1943, granting defendants Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees, etc., time within which to plead to Amended petition for Condemnation.

10. Amended Motion to Vacate Judgment and to Dismiss filed herein on November 22, 1943.

11. Order made and entered herein on November 30, 1943, denying Amended Motion to Vacate Judgment and to Dismiss.
12. Notice of Appeal filed herein on December 9, 1943.
13. This Designation.
14. Statement of Points on Appeal filed simultaneously herewith.

Dated December 24th, 1943.

Daniel K. Catlin,
Frederick Pitzman,
Lewis M. Rumsey, Jr.,
As Trustees under deed dated February 1, 1921, and recorded in the Public Records of Madison County, Illinois, in Book 471, at Page 621, commonly known as the Cool Land Syndicate,

By R. H. McRoberts,
R. H. McRoberts,
1630 Boatmen's Bank Building,
St. Louis, Missouri,

By Geo. D. Burroughs,
Geo. D. Burroughs,
Bank of Edwardsville Building,
Edwardsville, Illinois,
Their Attorneys.

Bryan, Williams, Cave & McPheeters,
Bryan, Williams, Cave & McPheeters,
1630 Boatmen's Bank Building,
St. Louis, Missouri.

Warnock, Williamson & Burroughs,
Warnock, Williamson & Burroughs,
Bank of Edwardsville Building,
Edwardsville, Illinois.

57 Certificate of Service.

I hereby certify that I have this day served the foregoing Designation of Portions of the Record and Proceedings to be included in the Record on Appeal upon the United States of America, petitioner, by mailing a copy thereof, properly addressed, to Howard L. Doyle, United States Attorney, Federal Building, Springfield, Illinois,

and to G. R. Schwarz, Special Attorney, Department of Justice, Jerseyville, Illinois.

Dated at Edwardsville, Illinois, this 24th day of December, 1943.

Geo. D. Burroughs,
Attorney for Defendants Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees.

Indorsed, Filed Dec. 27, 1943, G. W. Schwaner, Clerk.

58 United States of America,
Southern District of Illinois,
Southern Division. } ss.

I, G. W. Schwaner, Clerk of the United States District Court in and for the Southern District of Illinois, do hereby certify that the annexed and foregoing is a complete transcript of the proceedings had of record and on file in the case of the United States *vs.* 1,113 Acres of Land, more or less, situate in Madison County, Illinois, and Commonwealth Steel Company, a corporation, *et al.*, Civil Action No. 228, made in accordance with the Designation of Portions of the Record and Proceedings to be Included in the Record on Appeal, as fully as the same appears from the originals thereof now remaining among the records of the said County in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Springfield this 12th day of January, A. D. 1944.

G. W. Schwaner,
(Seal) *Clerk.*

[fol. 44] At a regular term of the United States Circuit of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the twenty-eighth day of September, in the year of our Lord one thousand nine hundred and forty-three, and of our Independence, the one hundred and sixty-eighth.

8500

THE UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

DANIEL K. CATLIN, FREDERICK PITZMAN and LEWIS M. RUMSEY, JR., as Trustees under Deed Dated February 1, 1921, etc., Defendants-Appellants

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division

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And, to-wit: On the fifteenth day of January, 1944, the above entitled appeal was docketed in this Court and the transcript was filed herein.

And afterwards, to-wit: On the eighteenth day of January, 1944, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellants, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Cause No. 8500

THE UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

DANIEL K. CATLIN, et al., etc., Defendants-Appellants

The Clerk will enter our appearance as counsel for Defendants-Appellants.

(Signed) R. H. McRoberts, 1630 Boatmen's Bank Bldg., St. Louis, Mo.; (Signed) Geo. D. Burroughs, Bank of Edwardsville Bldg., Edwardsville, Illinois.

U. S. C. C. A.-7. Filed Jan. 18, 1944. Kenneth J. Carrick, Clerk.

[fol. 45] And afterwards, to-wit: On the twenty-ninth day of January, 1944, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellee, which said appearance is in the words and figures following to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Cause No. 8500

THE UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

DANIEL K. CATLIN, et al., etc., Defendants-Appellants

The Clerk will enter our appearance as counsel for Plaintiff-Appellee.

(Signed) Howard L. Doyle, United States Attorney, Springfield, Ill.; (Signed) Marks Alexander, Asst. United States Attorney, Springfield, Ill.; (Signed) George R. Schwartz, Special Attorney, Dept. of Justice, Jerseyville, Ill.

U. S. C. C. A.-7. Filed Jan. 29, 1944. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the twentieth day of March, 1944, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Cause No. 8500

THE UNITED STATES OF AMERICA

vs.

KANIEL K. CATLIN, et al,, etc.

The Clerk will enter our appearance as counsel for Appellee.

(Signed) Norman M. Littell, Assistant Attorney General; (Signed) Vernon L. Wilkinson, Attorney, Dept. of Justice, Washington, D. C.

U. S. C. C. A.-7. Filed Mar. 20, 1944. Kenneth J. Carrick, Clerk.

[fol. 46] And afterwards, to-wit: On the fourteenth day of April, 1944, the following further proceedings were had and entered of record, to-wit:

Friday, April 14, 1944.

Court met pursuant to adjournment.

Before Hon. J. Earl Major, Circuit Judge; Hon. Otto Kerner, Circuit Judge; Hon. Sherman Minton, Circuit Judge

8500

THE UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

DANIEL K. CATLIN, FREDERICK PITZMAN and LEWIS M. RUMSEY, JR., as Trustees under Deed Dates February 1, 1921, etc.

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel, and an oral argument by Mr. R. H. McRoberts, counsel for appellants, and by Mr. Vernon L. Wilkinson, counsel for appellee, and the Court takes this matter under advisement.

And afterwards, to-wit: On the second day of June, 1944, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said opinion is in the words and figures following, to-wit:

[fol. 47] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, OCTOBER TERM, 1943, APRIL SESSION, 1944

No. 8500

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

vs.

DANIEL K. CATLIN, FREDERICK PITZMAN and LEWIS M. RUMSEY, JR., as Trustees under Deed Dated February 1, 1921, etc., *Defendants-Appellants*

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division

June 2, 1944

Before Major, Kerner and Minton, Circuit Judges

MAJOR, *Circuit Judge*. This is a condemnation proceeding instituted by the government March 31, 1942. The petition was filed under the Act of August 18, 1890, as amended, 50 U. S. C. A. § 171, and the Appropriations Act of December 17, 1941, 55 Stat. 810. It was alleged that the land to be condemned was "needed for the site, location, construction and prosecution of works for fortifications," and that the necessary funds had been appropriated. At the government's request, an order of immediate possession was entered on the day of the filing of the petition, and thereafter the War Department took such possession and commenced the construction of an Army Engineer Depot.

[fol. 48] On November 12, 1942, a Declaration of Taking was filed, pursuant to the Declaration of Taking Act of February 26, 1931, 40 U. S. C. A. § 258(a), in which appellants were named as the purported owners. The court on the same date entered a judgment or order decreeing that title to the lands described in such Declaration had vested in the United States upon the filing of such Declaration, and that "the right to just compensation for the same is now vested in persons entitled thereto." On November 30, 1943, the District Court denied appellants' motion to vacate the judgment entered November 12, 1942 on the Declaration of Taking, and to dismiss the petition in con-

demnation on the ground that the requisite jurisdictional facts and statutory authority had not been sufficiently alleged.

This appeal is from the judgment on the Declaration of Taking and from the order of November 30, 1943 denying appellants' motion to vacate such judgment and to dismiss the condemnation petition.

Two issues are presented for decision, which, stated in the order of their importance, are:

(1) Whether this court has jurisdiction of the appeal. This depends upon whether the judgment appealed from is final within the meaning of § 128 of the Judicial Code as amended, 28 U. S. C. A. § 225(a).

(2) Whether the condemnation proceeding was authorized by the statutory provision upon which it was predicated. If the first issue is determined adversely to appellants, it will be unnecessary to consider the second issue.

Under a long line of authorities, it has been held that a condemnation proceeding is not reviewable "until after final judgment, disposing of the whole case, and adjudicating all the rights, whether of title or damages, involved in the litigation. The case is not to be sent up in fragments • • • ." *Luxton* v. *North River Bridge Co.*, 147 U. S. 337, 341; *Southern Ry. Co.* v. *Postal Telegraph Co.*, 179 U. S. 641, 643; *Grays Harbor Co.* v. *Coats-Fordney Co.*, 243 U. S. 251, 256 (and many other cases which could be cited). On the authority of these cases, we think there is no question but that the part of the judgment appealed from which denied appellants' motion attacking the sufficiency of the complaint was not final and, therefore, not [fol. 49] subject to review. In fact, this court so held in *Dieckmann* v. *United States*, 88 F. 2d 902. It has recently been held that the denial of a challenge to the validity of an indictment lacks finality so as to give an appellate court jurisdiction to review. *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 30. By the same token, the court's denial of appellants' challenge to the sufficiency of the complaint is not reviewable.

It is contended, however, that the judgment on the Declaration of Taking which vested title in the government is final, and that such judgment is an exception to the gen-

eral rule as to finality in a condemnation proceeding. A number of courts have considered this question and appear to be in rather hopeless conflict. Appellants rely upon the decisions of three circuits as sustaining their position. *City of Oakland* v. *United States*, 124 F. 2d 959; *United States* v. *243.22 Acres of Land*, 129 F. 2d 678; and *Puerto Rico Ry. Light and Power Co.* v. *United States*, 131 F. 2d 491. The Oakland case carries little, if any, weight on the jurisdictional question, which it neither discusses nor decides. The 243.22 Acres of Land case in a measure sustains appellants' contention, although the judgment there appealed from was a "judgment of condemnation" and the court expressly pointed out (footnote page 683) that it made no decision as to whether a judgment based upon a Declaration of Taking as appealable. The Puerto Rico case squarely holds that a judgment on the Declaration of Taking is final and appealable.

Two courts have directly held to the contrary. *Turnbull* v. *United States*, 139 F. 2d 126, and *Dade County* v. *United States*, decided by the Fifth Circuit April 22, 194, —— F. 2d ——. It is doubtful if a review of these conflicting decisions would be of material assistance, and we shall not attempt to do so. It is sufficient to observe that the weight of the authority found in such decisions is almost equally divided and, under such circumstances, we feel perfectly free to reach an independent conclusion.

A study of the Declaration of Taking Act makes it plain, so we think, that any judgment rendered upon such taking is not final but merely interlocutory and not appealable, the same as any other interlocutory order. § 258(a) and related §§ 258(b), 258(c), 258(d) and 258(e), all enacted on the same date, have to do with procedure in condemnation pro-
[fol. 50] ceedings and all contain in their respective titles, "in advance of final judgment." § 258(a), which authorizes the filing of a Declaration of Taking, provides:

> "Upon the filing of such declaration of taking and of the deposit in the court * * * title to said lands * * * shall vest in the United States of America."

Further, it provides:

> "The right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein."

It provides for interest on such judgment on the "amount finally awarded as the value of the property as of the date of taking." It further provides that no interest shall be allowed on the portion of the compensation finally awarded as was paid into court at the time of the filing of the declaration of taking. Further, if the compensation finally awarded exceeds the amount deposited in court, judgment is to be entered against the United States for such excess, and if the amount finally awarded is less than that deposited, judgment shall be in favor of the United States for the difference. (Cf. *United States* v. *Miller*, 317 U. S. 369.)

It will thus be noted that the judgment referred to both in the title and in the Act is that which finally determines the "just compensation" to be awarded. Furthermore, the Act makes no requirement that a judgment or order be entered. The purpose of the Act is accomplished "upon the filing of said Declaration of Taking and of the deposit in the court." The entry of a judgment, therefore, is immaterial and renders no aid to the vesting of title in the government. This court so held in *United States* v. *Sunset Cemetery Co.*, 132 F. 2d 163, 164. As was said in the Dade County case, *supra:*

> "It does not matter whether the court makes any order about it or not. The Act proceeds to say: 'and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein'. That is the real and substantial function of the court. That judgment is the essential and final one. What precedes is interlocutory."

This view is consistent with and, we think, finds sup- [fol. 51] port in *United States* v. *Miller*, *supra*, wherein the court said (page 381):

> "When the declaration is filed the amount of estimated compensation is to be deposited with the court, to be paid as the court may order 'for or on account' of the just compensation to be awarded the owners. Thus the acquisition by the Government of title and immediate right to possession, and the deposit of the estimated compensation, occur as steps in the main proceeding."

As the Court on the following page stated: "The situation is like that in which litigants deposit money as security or to await the outcome of litigation."

An understanding of the purpose of the Act refutes the contention that a judgment entered upon a Declaration of Taking is final. Such purpose was stated in the Miller case, *supra* (page 381):

> "The purpose of the statute is two-fold. First, to give the Government immediate possession of the property and to relieve it of the burden of interest accruing on the sum deposited from the date of taking to the date of judgment in the eminent domain proceeding. Secondly, to give the former owner, if his title is clear, immediate cash compensation to the extent of the Government's estimate of the value of the property."

Premised upon the purpose thus stated, it appears that the Act was not designed to alter the rights of the parties. Nothing is added to or taken from either the right of the government to condemn or the constitutional right of the condemnee to be awarded "just compensation." It merely provides a procedure which protects the rights of the respective parties and expedites the method of their realization.

The government is not required to file a Declaration of Taking. Such procedure is optional. If it elects, however, to do so, it is required to estimate the value of the property taken and make such sum available as compensation to the land-owner. Such action is merely tentative, and, as already pointed out, the amount awarded may be increased or decreased by final judgment. The procedure thus employed is purely incidental to the main suit.

[fol. 52] Furthermore, we are doubtful if the procurement of title by the government under a Declaration of Taking is open to attack. It would seem that the validity of the government's action in taking is dependent solely upon its authority to condemn. If it has the authority to condemn, there follows under the Act the absolute right to take. If there is a lack of authority to condemn, there is also a lack of authority to take. In other words, the authority to condemn and the right to take must stand or fall together. We need not go this far, however, in deciding the question before us. It is sufficient, and we decide nothing more, that

a judgment rendered upon a Declaration of Taking is interlocutory and not subject to review. The appeal is

Dismissed.

A true Copy:

Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

[fol. 53] Endorsed: Filed June 2, 1944, Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the second day of June, 1944, the following further proceedings were had and entered of record, to-wit:

Friday, June 2, 1944

Court met pursuant to adjournment.

No. 8500

Before Hon. J. Earl Major, Circuit Judge; Hon. Otto Kerner, Circuit Judge; Hon. Sherman Minton, Circuit Judge.

THE UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

DANIEL K. CATLIN, FREDERICK PITZMAN, and LEWIS M. RUMSEY, JR., as Trustees under Deed Dates February 1, 1921, etc., Defendants-Appellants.

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Illinois, Southern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that this appeal be, and the same is hereby, dismissed.

And afterwards, to-wit: On the twenty-third day of June, 1944, the Mandate of this Court issued to the District Court of the United States for the Southern District of Illinois, Southern Division.

And afterwards, to-wit: On the third day of July, 1944, there was filed in the office of the Clerk of this Court, a Motion for Stay of Execution and Enforcement and Affidavit in Support thereof, which said motion and affidavit are in the words and figures following, to-wit:

[fol. 54] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 8500

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

DANIEL K. CATLIN, FREDERICK PITZMAN and LEWIS M. RUMSEY, JR., as Trustees under Deed dated February 1, 1921, etc., Defendants-Appellants

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division

MOTION FOR STAY OF EXECUTION AND ENFORCEMENT

Come now Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees under deed dated February 1, 1921, and recorded in the public records of Madison County, Illinois, in Book 471, at Page 621, Appellants in the above entitled cause, and respectfully show to this Honorable Court that they intend to and will file in the Supreme Court of the United States a petition for a writ of certiorari to review the opinion and decision rendered by this Court in the above entitled cause on June 2, 1944, dismissing their appeal in the above entitled cause.

And said Appellants further show to this Honorable Court that its mandate has heretofore on, to-wit, June 23, 1944, been issued and forwarded to the Clerk of the District Court of the United States for the Southern District of Illinois at Springfield.

Wherefore, the premises considered, the said Appellants pray that this Court may stay the execution and enforcement of said opinion and decision for a reasonable time, not less than (30) days, within which to allow the said Appellants to file in the Supreme Court of the United States such [fol. 55] petition for a writ of certiorari, and also that the

mandate heretofore issued to the said District Court may be recalled.

R. H. McRoberts, Attorney, 1630 Boatmen's Bank Building, St. Louis, Missouri. Bryan, Cave, McPheeters & McRoberts, 1630 Boatmen's Bank Building, St. Louis, Missouri. Warnock, Williamson & Burroughs, Bank of Edwardsville Building, Edwardsville, Illinois, of Counsel.

R. H. McRoberts, one of the attorneys for Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees under Deed dated February 1, 1921, etc., Appellants in the above entitled cause, hereby certifies that he has been directed by his said clients to take all necessary steps to obtain a review by the Supreme Court of the United States of the opinion and decision rendered by this Honorable Court in the above cause on June 2, 1944; that pursuant thereto he will file in the Supreme Court of the United States a petition for a writ of certiorari to review the said opinion and decision of this Honorable Court; that said proceedings are and will be taken in good faith in the honest belief that the aforesaid opinion and decision of this Court is erroneous, and because the Appellants are aggrieved by the said opinion and decision; and that the aforesaid application to this Court for stay of execution and enforcement and to recall its mandate is not filed, and the petition for a writ of certiorari which will be filed in the Supreme Court of the United States will not be filed, for purposes of delay.

R. H. McRoberts, Attorney for Appellants Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees under Deed dated February 1, 1921, etc.

[fol. 56] And afterwards, to-wit: On the twelfth day of July, 1944, the following further proceedings were had and entered of record, to-wit:

Wednesday, July 12, 1944.

Court met pursuant to adjournment.

Before Hon. Otto Kerner, Circuit Judge.

8500

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

DANIEL K. CATLIN, FREDERICK PITZMAN, and LEWIS M. RUMSEY, JR., as Trustees under Deed Dates February 21, 1921, etc., Defendants-Appellants.

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

Motion of counsel for appellants, it is ordered that the mandate of this Court heretofore issued herein be recalled, and that the reissuance of said mandate be and it is hereby, stayed pursuant to Rule 25 of the rules of this Court.

And afterwards, to-wit: On the tenth day of August, 1944, there was filed in the office of the Clerk of this Court, a Motion for Further Stay of Execution and Enforcement, which said Motion and Affidavit in support thereof is in the words and figures following, to-wit:

[fol. 57] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 8500

THE UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

DANIEL K. CATLIN, FREDERICK PITZMAN, and LEWIS M. RUMSEY, JR., as Trustees under Deed Dated February 1, 1921, etc., Defendant-Appellants.

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

MOTION FOR FURTHER STAY OF EXECUTION AND ENFORCEMENT

Come now Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees under deed dated February 1, 1921, and recorded in the public records of Madison County, Illinois, in Book 471, at Page 621, Appellants in the above entitled cause, and respectfully show to this Honorable Court that they intend to and will file in the Supreme Court of the United States a petition for a writ of certiorari to review the opinion and decision rendered by this Court in the above entitled cause on June 2, 1944, dismissing their appeal in the above entitled cause.

Said Appellants further show to the Honorable Court that its mandate was heretofore on, to-wit, June 23, 1944, issued and forwarded to the Clerk of the District Court of the United States for the Southern District of Illinois at Springfield and that this Honorable Court did heretofore on, to-wit, July 12, 1944, duly enter an order recalling said mandate and staying the same pursuant to Rule 25 of this Honorable Court.

Said Appellants further show to this Honorable Court that under said Rule 25 the stay of said mandate granted [fol. 58] by this Honorable Court on said July 12, 1944, shall not exceed 30 days unless extended by order of this Honorable Court; that said Appellants need time beyond August 11, 1944 (the 30th day after said July 12, 1944) to enable them properly to prepare, for filing in the Supreme Court of the United States, a petition for a writ of certiorari to review the aforesaid opinion and decision.

Wherefore, the premises considered, the said Appellants pray that this Court may further stay the execution and enforcement of said opinion and decision pending application by the Appellants to the Supreme Court of the United States for a writ of certiorari, provided said application is made on or before September 2, 1944.

R. H. McRoberts, Attorney, 1630 Boatmen's Bank Building, St. Louis, Missouri. Bryan, Cave, McPheeters & McRoberts, 1630 Boatmen's Bank Building, St. Louis, Missouri; Warnock, Williamson & Burroughs, Bank of Edwardsville Building, Edwardsville, Illinois. Of Counsel.

R. H. McRoberts, one of the attorneys for Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees under Deed dated February 1, 1921, etc., Appellants in

the above entitled cause, hereby certifies that he has been directed by his said clients to take all necessary steps to obtain a review by the Supreme Court of the United States of the opinion and decision rendered by this Honorable Court in the above cause on June 2, 1944; that pursuant thereto he will file in the Supreme Court of the United States a petition for a writ of certiorari to review the said [fol. 59] opinion and decision of this Honorable Court; that said proceedings are and will be taken in good faith in the honest belief that the aforesaid opinion and decision of this Court is erroneous, and because the Appellants are aggrieved by the said opinion and decision; and that the aforesaid application to this Court for further stay of execution and enforcement is not filed, and the petition for a writ of certiorari which will be filed in the Supreme Court of the United States will not be filed, for purposes of delay.

R. H. McRoberts, Attorney for Appellants, Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees under Deed dated February 1, 1921, etc.

[fol. 60] And on the same day, to-wit: On the tenth day of August, 1944, the following further proceedings were had and entered of record, to-wit:

Thursday, August 10, 1944.

Court met pursuant to adjournment.

Before Hon. J. Earl Major, Circuit Judge.

No. 8500

THE UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

DANIEL K. CATLIN, FREDERICK PITZMAN and LEWIS M. RUMSEY, JR., Trustees under Deed Dated February 1, 1921, etc., Defendants-Appellants.

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

On motion of counsel for appellants, it is ordered that the issuance of the mandate herein be further stayed to September 2, 1944.

And afterwards, to-wit: On the sixteenth day of August, 1944, there was filed in the office of the Clerk of this Court, a Praecipe for Record, which said praecipe is in the words and figures following, to-wit:

[fol. 61] [Stamp:] U. S. C. C. A.—7 Filed Aug. 16, 1944. Kenneth J. Carrick, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 8500

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

DANIEL K. CATLIN, FREDERICK PITZMAN and LEWIS M. RUMSEY, JR., Trustees under Deed Dated February 1, 1921, etc., Defendants-Appellants.

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

Praecipe for Record

To Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit:

Please prepare certified transcript of the record in the above entitled cause for filing in the United States Supreme Court, pursuant to Supreme Court Rule 38, including

1. Printed Transcript of Record.

2. Entire proceedings in the United States Circuit Court of Appeals for the Seventh Circuit, including, but without limitation—

(a) Filing and Docketing of Transcript of Record on Appeal.

(b) Argument and Submission on April 14, 1944.

(c) Opinion and Decision dated June 2, 1944.

(d) Mandate and Order Issuing same.

(e) Motion for Stay of Execution and Enforcement and for Recall of Mandate.

(f) Order recalling mandate and staying same.

(g) Motion for Further Stay of Execution and Enforcement.

(h) Order Staying Mandate until September 2, 1944.

R. H. McRoberts, 1630 Boatmen's Bank Building, St. Louis, Missouri, Attorney for Appellants. [fol. 62] Bryan, Cave, McPheeters & McRoberts, 1630 Boatmen's Bank Building, St. Louis, Missouri. Warnock, Williamson & Burroughs, Bank of Edwardsville Building, Edwardsville, Illinois, of Counsel.

[fol. 63] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten pages contain a true copy of proceedings had and papers filed as called for by the designation for record with the exception of item (d), these entries not appearing on the records of this Court, filed on the sixteenth day of August, 1944, in:

Cause No. 8500

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

vs.

DANIEL K. CATLIN, FREDERICK PITZMAN and LEWIS M. RUMSEY, JR., as Trustees under Deed Dated February 1, 1921, etc., Defendants-Appellants,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this seventeenth day of August A. D. 1944.

Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit. (Seal.).

[fol. 64] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 23, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5647)

FILE COPY

SEP 1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

DANIEL K. CATLIN, FREDERICK PITZMAN and LEWIS M. RUMSEY, JR., as Trustees Under Deed Dated February 1, 1921, and Recorded in the Public Records of Madison County, Illinois, in Book 471, at Page 621, Commonly Known as the Cool Land Syndicate,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

No. 419

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Seventh Circuit and

SUPPORTING BRIEF.

THOMAS S. McPHEETERS,
HENRY DAVIS,
1630 Boatmen's Bank Building,
St. Louis, Missouri,
Counsel for Petitioners.

GEORGE D. BURROUGHS,
Edwardsville, Illinois,
Of Counsel.

Dated August 28, 1944.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

DANIEL K. CATLIN, FREDERICK PITZMAN and LEWIS M. RUMSEY, JR., as Trustees Under Deed Dated February 1, 1921, and Recorded in the Public Records of Madison County, Illinois, in Book 471, at Page 621, Commonly Known as the Cool Land Syndicate,

Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

No.

PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Seventh Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees under Deed dated February 1, 1921, and recorded in the Public Records of Madison County, Illinois, in Book 471, at page 621, commonly known as the Cool Land Syndicate, respectfully show:

Your petitioners seek to review the opinion and decision of the United States Circuit Court of Appeals for the Seventh Circuit rendered and filed on June 2, 1944, and the order and judgment of said Court entered pursuant to said opinion and decision on June 2, 1944, wherein said Court dismissed an appeal from a judgment on a Declaration of Taking and from an order denying a motion to vacate such judgment and to dismiss a condemnation petition.

The opinion of the Circuit Court of Appeals is reported in 142 Fed. (2d) 781.

I.

JURISDICTION.

The opinion and decision of the Circuit Court of Appeals was filed on June 2, 1944. The order and judgment of the Circuit Court of Appeals, entered in conformity with said opinion and decision, dismissing the appeal from the judgment on the Declaration of Taking and from the order denying the motion to vacate such judgment and to dismiss the condemnation petition was entered on June 2, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. A., Section 347 (a), and under Section 8 of the Act of Feb. 13, 1925, 43 Stat. 940, 28 U. S. C. A., Section 350.

II.

QUESTIONS PRESENTED.

The following questions are presented for consideration in connection with this petition for a writ of certiorari:

1. Was the judgment on the Declaration of Taking made and entered in the District Court on November 12, 1942, final and appealable within the meaning of Section 128 of the Judicial Code, as amended by the Act of February 13,

1925, 43 Stat. 936, and the Act of June 20, 1938, 52 Stat. 779, 28 U. S. C. A., Sec. 225 (a)?

2. Was the order denying the motion to vacate such judgment and to dismiss the condemnation petition, made and entered in the District Court on November 30, 1943, final and appealable within the meaning of Section 128 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, and the Act of June 20, 1938, 52 Stat. 779, 28 U. S. C. A., Sec. 225 (a)?

III.

STATUTES INVOLVED.

Section 128 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, and the Act of June 20, 1938, 52 Stat. 779, 28 U. S. C. A., Sec. 225 (a), reads in part as follows:

> "Sec. 225. (Judicial Code, Section 128, amended.) Appellate jurisdiction—
>
> "(a) Review of final decisions. The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—
>
> "First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

The Declaration of Taking Act, approved February 26, 1931, c. 307, 46 Stat. 1421, 40 U. S. C. A., Sec. 258a-258e, reads in part as follows:

> "Sec. 258a. Same; lands, easements, or rights-of-way for public use; taking of possession and title in advance of final judgment; authority; procedure.
>
> "In any proceeding in any court of the United States outside of the District of Columbia which has

been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

"(1) A statement of the authority under which and the public use for which said lands are taken.

"(2) A description of the lands taken sufficient for the identification thereof.

"(3) A statement of the estate or interest in said lands taken for said public use.

"(4) A plan showing the lands taken.

"(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

"Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date

to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

"Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

"Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable. Feb. 26, 1931, c. 307, sec. 1, 46 Stat. 1421.

"Sec. 258b. Same; taking in advance of final judgment; appeal or giving of bond as preventing or delaying vesting of title.

"No appeal in any cause under section 258 of this title nor any bond or undertaking given therein shall operate to prevent or delay the vesting of title to such lands in the United States. Feb. 26, 1931, c. 307, sec. 2, 46 Stat. 1422.

* * * * * * *

"Sec. 258d. Same; taking in advance of final judgment; right as additional to existing rights, powers, and authority.

"The right to take possession and title in advance of final judgment in condemnation proceedings as provided by section 258a of this title shall be in addition

to any right, power, or authority conferred by the laws of the United States or those of any State or Territory under which such proceedings may be conducted, and shall not be construed as abrogating, limiting, or modifying any such right, power, or authority. Feb. 26, 1931, c. 307, sec. 4, 46 Stat. 1422.

"Sec. 258e. Same; taking in advance of final judgment; demolition of buildings thereon; erection of public buildings or works; funds available for purpose; application of section 255.

"In any case in which the United States has taken or may take possession of any real property during the course of condemnation proceedings and in advance of final judgment therein and the United States has become irrevocably committed to pay the amount ultimately to be awarded as compensation, it shall be lawful to expend moneys duly appropriated for that purpose in demolishing existing structures on said land and in erecting public buildings or public works thereon, notwithstanding the provisions of section 255 of this title: Provided, That in the opinion of the Attorney General, the title has been vested in the United States or all persons having an interest therein have been made parties to such proceeding and will be bound by the final judgment therein. Feb. 26, 1931, c. 307, sec. 5, 46 Stat. 1422."

IV.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The United States of America brought action in the District Court of the United States for the Southern District of Illinois, Southern Division, to condemn certain land situated in Madison County, Illinois. In the District Court the case was styled "United States of America, Petitioner, vs. 1,113 Acres of Land, more or less, Situate in Madison County, Illinois, and Commonwealth Steel Company, a Corporation, et al, Defendants."

The petition for condemnation was filed on March 31, 1942, under the Act of Congress approved August 18, 1890 (20 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), and April 11, 1918 (40 Stat. 518, 50 U. S. C., Section 171).

On November 12, 1942, Declaration of Taking No. 1, signed by the Secretary of War, was filed, and thereafter and on the same day the District Court entered judgment on said declaration, vesting title in the United States of America "upon the filing of the Declaration of Taking * * *."

Thereafter service by publication was had upon Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees, commonly known as the Cool Land Syndicate, the owners of a part of the land sought to be condemned. In due course they filed their Motion to Vacate Judgment and to Dismiss.

Afterwards, to-wit, on November 17, 1943, the United States of America, by leave, amended its Petition for Condemnation. On November 22, 1943, Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees under deed dated February 1, 1921, and recorded in the Public Records of Madison County, Illinois, in Book 471, at page 621, commonly known as the Cool Land Syndicate, filed their Amended Motion to Vacate Judgment and to Dismiss. Therein they moved the Court to vacate the judgment as to Tract No. 7 (the part of the land sought to be condemned which they owned) entered on November 12, 1942, and to dismiss the petition for condemnation as amended on November 17, 1943. Afterwards, to-wit, on November 30, 1943, the District Court made and entered an order and judgment denying said amended motion.

On December 9, 1943, Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees, as aforesaid, filed in the District Court a Notice of Appeal, whereby notice was given that they thereby appealed to the United

States Circuit Court of Appeals for the Seventh Circuit from (a) the judgment on declaration of taking made and entered on November 12, 1942, and (b) the judgment and order made and entered on November 30, 1943, overruling and denying their amended motion to vacate judgment and to dismiss. On December 27, 1943, they filed in the District Court their Statement of Points on Appeal and their Designation of Portions of the Record and Proceedings to be included in the Record on Appeal—in the order mentioned.

In the United States Circuit Court of Appeals for the Seventh Circuit the cause was styled "The United States of America, Plaintiff-Appellee, vs. Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees under Deed dated February 1, 1921, etc., Defendants-Appellants." After proceedings not material here, the Circuit Court of Appeals on April 14, 1944, took the cause under advisement following hearing and oral argument.

The opinion and decision of the Circuit Court of Appeals was rendered and filed in said court on June 2, 1944. The order and judgment of said court, entered in conformity with said opinion and decision, dismissing the appeal was entered on June 2, 1944.

The decision of the United States Circuit Court of Appeals was:

(a) That the judgment on the Declaration of Taking was not final and not appealable;

(b) That the order denying the motion to vacate the judgment on the Declaration of Taking and to dismiss the condemnation petition, as amended, was not final and not appealable.

V.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The decision of the United States Circuit Court of Appeals for the Seventh Circuit that the judgment on the Declaration of Taking was not final and not appealable is directly contrary to, and in conflict with, the decisions of other United States Circuit Courts of Appeals on the same matter, to-wit: The decision of the United States Circuit Court of Appeals for the Ninth Circuit in the case of City of Oakland v. United States, 124 F. 2d 959, decided January 14, 1942; the decision of the United States Circuit Court of Appeals for the Second Circuit in the case of United States v. 243.22 Acres of Land, 129 F. 2d 678, decided June 26, 1942; the decision of the United States Circuit Court of Appeals for the First Circuit in the case of Puerto Rico Ry. Light & Power Co. v. United States, 131 F. 2d 491, decided November 27, 1942.

2. The decision of the United States Circuit Court of Appeals for the Seventh Circuit that the order denying the motion to vacate the judgment on the Declaration of Taking and to dismiss the condemnation petition, as amended, was not final and not appealable, is directly contrary to, and in conflict with, the decisions of other United States Circuit Courts of Appeals on the same matter, to wit: The decision of the United States Circuit Court of Appeals for the Ninth Circuit in the case of City of Oakland v. United States, 124 F. 2d 959, decided January 14, 1942; the decision of the United States Circuit Court of Appeals for the Second Circuit in the case of United States v. 243.22 Acres of Land, 129 F. 2d 678, decided June 26, 1942; the decision of the United States Circuit Court of Appeals for the First Circuit in the case of Puerto Rico Ry. Light & Power Co. v. United States, 131 F. 2d 491, decided November 27, 1942.

3. In holding that the judgment on the Declaration of Taking was not final and not appealable, the United States Circuit Court of Appeals for the Seventh Circuit decided an important question of federal law which has not been, but should be, settled by this Court.

4. In holding that the order denying the motion to vacate the judgment on the Declaration of Taking and to dismiss the condemnation petition, as amended, was not final and not appealable, the United States Circuit Court of Appeals for the Seventh Circuit decided an important question of federal law which has not been, but should be, settled by this Court.

VI.

PRAYER FOR WRIT.

Wherefore, your petitioners, Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees under deed dated February 1, 1921, and recorded in the Public Records of Madison County, Illinois, in Book 471, at page 621, commonly known as the Cool Land Syndicate, respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, and commanding that Court to certify and send to this Court for its determination, on a date certain to be therein named, a full and complete transcript of the record and of all the proceedings in the Case numbered on its docket No. 8500, and entitled "The United States of America, Plaintiff-Appellee, v. Daniel K. Catlin, Frederick Pitzman and Lewis M. Rumsey, Jr., as Trustees under deed dated February 1, 1921, etc., Defendants-Appellants," and that

the order and judgment of said Circuit Court of Appeals be reversed and that your petitioners may have such other and further relief in the premises as to this Court may seem proper.

Respectfully submitted,

DANIEL K. CATLIN,
FREDERICK PITZMAN,
LEWIS M. RUMSEY, JR.,
As Trustees Under Deed Dated February 1, 1921, and Recorded in the Public Records of Madison County, Illinois, in Book 471, at Page 621, Commonly Known as the Cool Land Syndicate,

By THOMAS S. McPHEETERS,
HENRY DAVIS,
Their Counsel,
1630 Boatmen's Bank Building,
St. Louis, Missouri.

GEORGE D. BURROUGHS,
Bank of Edwardsville Building,
Edwardsville, Illinois,
Of Counsel.

BRIEF

In Support of Petition for a Writ of Certiorari.

I.

OPINION BELOW.

The opinion and decision of the Circuit Court of Appeals for the Seventh Circuit was filed on June 2, 1944, and is reported in 142 Fed. (2d) 781. The order and judgment of the Circuit Court of Appeals was entered in conformity with said opinion and decision on June 2, 1944, and is not officially reported.

II.

JURISDICTION.

A statement of the grounds on which the jurisdiction of this Court is invoked is given in the petition (p. 2) and, to avoid duplication, is not repeated.

III.

STATEMENT OF THE CASE.

A statement of the case has been given in the petition (pp. 6 to 8), and to avoid duplication, is not repeated.

IV.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

1. The United States Circuit Court of Appeals for the Seventh Circuit erred in holding and deciding that the judgment on the Declaration of Taking was not final and not appealable.

2. The United States Circuit Court of Appeals for the Seventh Circuit erred in holding and deciding that the order denying the motion to vacate the judgment on the Declaration of Taking and to dismiss the condemnation petition, as amended, was not final and not appealable.

V.

ARGUMENT.

A. Recognition of Conflict in Decisions.

The United States Circuit Court of Appeals for the Seventh Circuit, in its opinion in the instant case, 142 Fed. (2d) 781, recognized a conflict in decisions on the matters here involved. It said (l. c. 783):

> "It is contended, however, that the judgment on the Declaration of Taking which vested title in the government is final, and that such judgment is an exception to the general rule as to finality in a condemnation proceeding. A number of courts have considered this question and appear to be in rather hopeless conflict. Appellants rely upon the decisions of three circuits as sustaining their position. City of Oakland v. United States, 9 Cir., 124 F. 2d 959; United States v. 243.22 Acres of Land, 2 Cir., 129 F. 2d 678, and Puerto Rico Ry., Light & Power Co. v. United States, 1 Cir. 131 F. 2d 491. The Oakland case carries little, if any, weight on the jurisdictional question, which it neither discusses nor decides. The 243.22 Acres of Land case in a measure sustains appellants' contention, although, the judgment there appealed from was a 'judgment of condemnation' [124 F. 2d 962], and the court expressly pointed out (footnote, page 683 of 129 F. 2d) that it made no decision as to whether a judgment based upon a Declaration of Taking was appealable. The Puerto Rico case squarely holds that a judgment on the Declaration of Taking is final and appealable.
>
> "Two courts have directly held to the contrary. Turnbull v. United States, 6 Cir., 139 F. 2d 126, and Dade County v. United States, decided by the Fifth Circuit April 22, 1944, 142 F. 2d 230. It is doubtful if a review of these conflicting decisions would be of material assistance, and we shall not attempt to do so. It is sufficient to observe that the weight of the authority found in such decisions is almost equally divided and, under such circumstances, we feel perfectly free to reach an independent conclusion."

B. Decisions of Other United States Circuit Courts of Appeals With Which the Decisions of the United States Circuit Court of Appeals for the Seventh Circuit in This Case Are in Conflict.

(a) City of Oakland v. United States.

The case of City of Oakland v. United States, 124 F. (2d) 959, decided by the United States Circuit Court of Appeals for the Ninth Circuit on January 14, 1942, involved an appeal from a judgment on a Declaration of Taking entered by the District Court of the United States for the Northern District of California, Southern Division, and from an order entered by the same court, denying a motion to vacate such judgment. The appeal was both from the judgment and from the order, each appeal serving the same purpose.

A proceeding by the United States to acquire by condemnation certain land on the Oakland waterfront for the military purposes of the United States as described in "An Act to authorize condemnation proceedings of lands for military purposes," 40 Stat. 241, as amended, 50 U. S. C. A., Sec. 171, and referred to in the Act of September 8, 1940, Public No. 781, 76 Cong. 3d Sess., appropriating money therefor, was instituted by filing a complaint in condemnation against the appellant and others on January 15, 1941. Simultaneously with the filing of the complaint there was filed in the name of the United States by the Secretary of War a Declaration of Taking conforming to the requirements of 40 U. S. C. A., Sec. 258a, and there was deposited in the registry of the court the estimated amount of just compensation for the property. Upon the filing of the Declaration of Taking and the making of the deposit, the Court entered a judgment, finding that the requirements of said statute had been complied with, and decreeing that in accordance with the terms and provisions of

the statute, title had vested in the United States; that the lands were deemed to have been condemned and taken for the use of the United States, and that the right to just compensation had vested in the persons entitled thereto, to "be ascertained and awarded in this proceeding and established by judgment herein pursuant to law." Summons was served upon the appellant January 16, 1941. On February 14, 1941, appellant filed a motion to vacate the judgment. This motion was denied on March 6, 1941.

One of the specifications of error addressed to the judgment was that the court erred in entering a judgment of condemnation on the declaration of taking, in the absence of any statutory authorization for any judgment thereon. The sole specification of error addressed to the order was that the court erred in denying the appellant's motion to vacate the judgment, to the end that the appellant might be given an opportunity to be heard at the trial upon any and all issues that may properly be raised in the proceeding.

The holding and decision of the United States Circuit Court of Appeals for the Ninth Circuit was expressed in these words (l. c. 963):

> "But appellant does challenge the power of the court to enter the judgment complained of, and insists that there is no authority therefor to be found in the law. The statute, however, declares that upon the performance of certain requirements the condemnation shall be effective. The judgment of the court here merely recites that it has found that these requirements have been met. The statute also provides that if the final award made exceeds the amount paid into court, interest shall be allowed on the amount of the excess from the date of the taking, and, further, the court is required to fix the time and the terms upon which defendant shall surrender possession, which all implies that the court must first express its judgment that the requirements of the statute have been com-

plied with. This is in accordance with orderly procedure. To advise the appellant of the action that has been taken certainly does not adversely affect the enforcement of its rights.

"The entry of an order by a District Court, without the benefit of express statutory authority, permitting the United States to take immediate possession to land sought to be condemned was upheld in Commercial Station Post Office v. United States, 8 Cir., 48 F. 183, and followed in Hessel v. A. Smith & Co., D. C., 15 F. Supp. 953, and United States v. Eighty Acres of Land, D. C., 26 F. Supp. 315."

The Circuit Court of Appeals affirmed the judgment of the District Court and the order of the District Court denying the motion to vacate the judgment.

In United States v. 243.22 Acres of Land, 129 F. 2d 678, the United States Circuit Court of Appeals for the Second Circuit said (l. c. 683):

"* * * Yet the court of appeals in the Oakland case passed on the merits. Its opinion does not mention the question of appellate jurisdiction, although our examination of the briefs shows that that question had been raised. Certiorari was denied May 14, 1942, 62 S. Ct. 1106, 86 L. Ed. . . ."

For denial of certiorari in the City of Oakland case, see 316 U. S. 679, 62 S. Ct. 1106, 86 L. Ed. 1753.

(b) United States v. 243.22 Acres of Land.

The case of United States v. 243.22 Acres of Land, 129 F. (2d) 678, decided by the United States Circuit Court of Appeals for the Second Circuit on June 26, 1942, involved an appeal from a judgment of condemnation entered by the District Court of the United States for the Eastern District of New York, and from certain orders of that Court not material here.

On December 17, 1940, the Secretary of War, in a letter to the Attorney General, requested the institution of pro-

ceedings to condemn appellant's land, stating that such acquisition was necessary for military purposes under the Act of July 2, 1940, 54 Stat. 712, 41 U. S. C. A. preceding section 1. The United States filed its petition in the court below to acquire the lands on December 19, 1940, attaching the Secretary's letter as an exhibit to the petition. At the same time, it filed a declaration of taking (signed by the Secretary), pursuant to the Act of February 26, 1931, 40 U. S. C. A., Sec. 258a, and deposited in court the estimated compensation. Judgment was entered the next day, December 20, 1940, declaring that fee simple title had vested in the United States and that the right to just compensation had vested in the persons entitled thereto, and directing immediate delivery of possession to the United States.

Appellant, by answer filed September 11, 1941, asked dismissal of the proceeding, alleging, among other things, that the proceeding was not authorized by law. An amended petition was then filed by the United States. Three days later appellant answered this petition, repeating the defenses contained in the original answer and alleging that the Court had no jurisdiction and that the petition did not state facts sufficient to constitute a cause of action.

Trial then ensued on the issues (other than compensation). On January 20, 1942, a judgment of condemnation was entered. Appellant appealed from this judgment and from the above mentioned orders.

The Circuit Court of Appeals for the Second Circuit said (l. c. 679):

> "A question is raised as to our jurisdiction to entertain the appeal from the judgment of condemnation entered, on January 20, 1942, after a trial upon issues other than that of compensation, but where compensation still remained to be determined. Our appellate jurisdiction is limited to 'final decisions,' with exceptions here irrelevant. 28 U. S. C. A., Sec. 225. The

judgment here, if it is not final, is not one of the kinds of interlocutory orders from which appeal is allowed under 28 U. S. C. A., Sec. 227."

The Court later said (l. c. 681):

"* * * In Forgay v. Conrad, 6 How. 201, 204, 12 L. Ed. 404, a decree set aside certain deeds as fraudulent and void; it ordered that certain lands and slaves should be delivered to the complainant, that one of the defendants should pay a certain sum of money to the complainant and that the complainant should have execution for these matters; it also provided that a master should take an account of the profits of the lands and slaves and of certain monies and notes. The court held that this decree was appealable. * * * The same ruling was made in Thomson v. Dean, 7 Wall. 342, 345, 19 L. Ed. 94. * * *"

The Court then cited several condemnation suits in which appellate jurisdiction was denied where damages remained to be assessed, and then embodied its holding and decision in this language (l. c. 282):

"However, in those cases, under the applicable statutes, there could be and there was no judgment as to title and possession until after the damages had been determined. Here the appeal is from a judgment of condemnation which, under the applicable statutory provisions, determined, after a trial, that the United States had title and was entitled to possession so that, if the appeal is postponed until after damages are assessed, the United States may, in the interval, enter upon the land and erect structures thereon or otherwise so act as to change the status substantially. The judgment of January 20, 1942, is, therefore, similar to the orders held appealable in Forgay v. Conrad, supra, and Thomson v. Dean, supra."

The Court affirmed the judgment.

Certiorari was denied in Lambert, Executrix, v. United States, 317 U. S. 698, 63 S. Ct. 441, 87 L. Ed. 558.

(c) Puerto Rico Ry. Light & Power Co. v. United States.

The case of Puerto Rico Ry. Light & Power Co. v. United States, 131 F. (2d) 491, decided by the United States Circuit Court of Appeals for the First Circuit on November 27, 1942, involved an appeal from a judgment of the District Court of the United States for Puerto Rico, decreeing title of properties of the defendant to be vested in the United States and authorizing the United States to enter upon and take possession of the premises.

The original petition for condemnation was filed on June 29, 1942, by the United States Attorney at the direction of the Attorney General, pursuant to the request of the Federal Works Administrator under the provisions of the amended Lanham Act, 55 Stat. 361. Accompanying the petition were a Declaration of Taking, a Motion for Judgment on Declaration of Taking, and an Order to Surrender Possession, and a deposit by the United States of the estimated amount of compensation due—all in accordance with the condemnation procedure authorized by the Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. A., Secs. 258a-258e. On the same day that the petition was filed, the District Court entered an ex parte judgment vesting title in the United States and ordering immediate surrender of possession. This judgment was vacated upon motion by defendant. The United States filed an amended petition for condemnation and renewed its motion for judgment on the Declaration of Taking. Defendant demurred to the amended petition, asserting its insufficiency on various legal grounds. After hearing and argument, the Court rejected the contentions of the defendant, and on July 10, 1942, entered the judgment appealed from.

The Circuit Court of Appeals for the First Circuit said (l. c. 494):

"At the outset the United States challenges our jurisdiction to entertain the appeal, on the ground

that the judgment is not a 'final decision' within the meaning of § 128 of the Judicial Code, 28 U. S. C. A., § 225. It is said that the judgment merely determined the Government's right to condemn, leaving damages for the taking yet to be assessed, and that it is therefore not a final and appealable judgment. This contention has been squarely rejected by the Second Circuit in a careful opinion reviewing all the authorities. United States v. 243.22 Acres of Land, 2 Cir., 1942, 129 F. 2d 678. We agree with this decision. See also City of Oakland v. United States, 9 Cir., 1942, 124 F. 2d 959, certiorari denied, 1942, 316 U. S. 679. * * * We said in Hubert Hermanos, Inc., v. People of Puerto Rico, 1 Cir., 1941, 118 F. 2d 752, 757: 'A "final decision" is not necessarily the ultimate judgment or decree completely closing up a proceeding. In the course of a proceeding there may be one or more final decisions on particular phases of the litigation, reserving other matters for future determination.' Under the earlier act of August 1, 1888, 25 Stat. 357, 40 U. S. C. A. §§ 257, 258, establishing the procedure for the judicial condemnation of land, there could be no judgment affecting title or possession until after the damages had been determined. It was the particular purpose of the Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. A. §§ 258a-258e, to sever the taking of title and possession from controveries as to valuation, and to provide a procedure whereby the United States might be speedily and conclusively vested with title and possession, with authority to demolish existing structures on the condemned land, leaving the issue as to the amount of compensation to be determined in subsequent proceedings. The judgment on the declaration of taking, having this final and immediate effect on property rights, obviously should be reviewable at once, without the necessity of awaiting the outcome of long drawn out controversies as to valuation. Therefore, on reason as well as on authority,

we hold that the judgment in question is a 'final decision' within the meaning of § 128 of the Judicial Code."

The Circuit Court of Appeals vacated the judgment of the District Court and remanded the case to that court.

C. Decision of Another United States Circuit Court of Appeals With Which the Decisions of the United States Circuit Court of Appeals for the Seventh Circuit in This Case Are in Accord.

(a) Dade County, Fla. v. United States.

The case of Dade County, Fla., v. United States, 142 F. 2d 230, decided by the United States Circuit Court of Appeals for the Fifth Circuit on April 22, 1944, involved an appeal from an order of the District Court of the United States for the Southern District of Florida, amending a prior order on a declaration of taking.

On February 12, 1943, a proceeding was filed in the District Court of the United States for the Southern District of Florida, for condemnation under stated Acts of Congress, including the Second War Powers Act of March 27, 1942, 50 U. S. C. A., Appendix, Sec. 632, of a tract of land in Dade County, Florida, determined by the Secretary of War to be necessary for a supply and repair depot in connection with a Government airport. On February 15, the District Court made an ex parte order for immediate possession "subject to existing easements for public roads and highways." On March 24 the United States amended the petition by striking out the words subject to public roads and highways, and on the same day the court granted a new order for possession which conformed to the amendment. On April 14, Dade County entered an objection to the taking of two named highways in fee simple on certain stated grounds. A motion was also filed on the same

grounds to modify the last order for possession. On May 24 and July 23 orders were taken apparently ex parte, and based on declaration of taking and the deposit in the registry of the court of the estimated just compensation of two parcels of the land, which order declared that the United States was vested with the title in fee simple to the lands described. On August 16 the United States sought to amend the first declaration of taking so as to include the roads and highways. On that date the judge of the District Court heard the objection and motion of Dade County and overruled them, and by a separate order of the same date amended the order on the declaration of taking as moved by the United States. The appeal was from the order of August 16, 1943.

The Circuit Court of Appeals for the Fifth Circuit said (l. c. 231):

> "We are of opinion that the refusal to modify the order touching possession, and the amendment of the order touching the vesting of title are not final judgments substantially disposing of the case and leaving merely a distribution of a fund to be accomplished * * *."

And in its discussion of the "Declaration of Taking Act," the Court said (l. c. 231):

> "* * * The statute declares: 'Upon the filing of said declaration of taking and the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands * * * shall vest in the United States of America * * * and the right to just compensation for the same shall vest in the persons entitled thereto.' It does not matter whether the court makes any order about it or not. The Act proceeds to say, 'and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein.' That is the real and substan-

tial function of the court. That judgment is the essential and final one. What precedes is interlocutory. * * *

"Date County, we conclude, may not arrest the condemnation proceeding by an appeal at this time touching the possession or title to its roads. That may be examined after compensation has been fixed. * * *

"The appeal is premature and is dismissed."

Note: Turnbull v. United States, 139 F. (2d) 126, was decided by the United States Circuit Court of Appeals for the Sixth Circuit on November 29, 1943. In its opinion, in the instant case, 142 Fed. (2d) 781, the United States Circuit Court of Appeals for the Seventh Circuit cites (l. c. 783) Turnbull v. United States as holding contrary to the Puerto Rico case. The Turnbull case appears, however, to be not in point.

D. Important Questions of Federal Law.

In the instant case the United States Circuit Court of Appeals for the Seventh Circuit decided that (a) a judgment on a Declaration of Taking was not final and not appealable and (b) an order denying a motion to vacate a judgment on a Declaration of Taking and to dismiss a condemnation petition was not final and not appealable. In so doing, that Court decided questions of federal law which have not been settled by the Supreme Court of the United States, namely, (a) the appealability of a judgment on a Declaration of Taking and (b) the appealability of an order denying a motion to vacate such a judgment and to dismiss a condemnation petition. These questions are important, and should be settled by the Supreme Court of the United States, because (a) a large number of owners have been, are being, and probably will be, divested of

title to property under and by such judgments and (b) the value of properties which have been, are being, and probably will be, affected by such judgments is great.

Petitioners, therefore, respectfully submit that the Court, in the exercise of its supervisory power, should grant to the petitioners a writ of certiorari and thereafter review and reverse the order and judgment of the Circuit Court of Appeals.

Respectfully submitted,

DANIEL K. CATLIN,
FREDERICK PITZMAN,
LEWIS M. RUMSEY, JR.,
As Trustees Under Deed Dated February 1, 1921, and Recorded in the Public Records of Madison County, Illinois, in Book 471, at Page 621, Commonly Known as the Cool Land Syndicate,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

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Petitioners,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

No. 419.

BRIEF OF DANIEL K. CATLIN ET AL., PETITIONERS.

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OPINION BELOW.

The opinion of the Circuit Court of Appeals, dated June 2, 1944, is officially reported in 142 Fed. (2d) 781.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925 (28 U. S. C. A., Section 347). The judgment of the Circuit Court of Appeals was entered on June 2, 1944 (R. p. 52). The petition for certiorari was filed by petitioners on September 1, 1944, and was granted by this Court on October 23, 1944.

STATEMENT OF THE CASE.

On March 31, 1942, the United States of America filed in the District Court of the United States for the Southern District of Illinois, Southern Division, its petition for condemnation whereby the Government sought to condemn 1,113 acres of land, more or less, situated in Madison County, Illinois (R. p. 2). The petition stated that it was filed pursuant to the Act of August 18, 1890, as amended, 50 U. S. C. A., Section 171, and the Appropriations Act of December 17, 1941, 55 Stat. 810 (R. p. 3).

On November 12, 1942, there was filed in the office of the Clerk of said District Court a Declaration of Taking No. 1 (R. p. 13). Thereafter, and on the same 12th day of November, 1942, said District Court entered its Judgment on First Declaration of Taking, by the terms of which the Court "Ordered, Adjudged and Decreed that the title to said lands in fee simple absolute, and together with the buildings and improvements thereon and the appurtenances thereto appertaining, subject only to existing easements for public roads and highways, for public utilities, for railroads and for pipe lines, be vested* in the United States of America upon the filing of the said Declaration of Taking and the depositing in the Registry of this Court of the amount of estimated just compensation, to-wit, the sum of $105,770.00 * * *," which sum the Court found in the said judgment had already been so deposited (R. p. 23).

On August 2. 1943, one year and four months after the original petition was filed, the District Court made and entered its Order of Publication, pursuant to which service was had upon your petitioners (R. p. 28).

In due course, on October 7, 1943, petitioners filed in said District Court their Motion to Vacate Judgment and to Dismiss, in which petitioners challenged both the sufficiency of the Petition for Condemnation and the authority

*Through an obvious typographical error the record reads "veseted" (R. p. 24).

of the Government to condemn for the purpose for which the land was sought to be taken, under the Act pursuant to which the petition was filed (R. p. 29). Thereafter the Government amended its petition for condemnation (R. p. 31), and your petitioners filed their Amended Motion to Vacate Judgment and to Dismiss, again challenging both the sufficiency of said amended petition and the authority of the Government to take the land for the purpose disclosed by such amended petition, under the Act pursuant to which the suit was brought.

On November 30, 1943, the Court entered its order denying petitioners' Amended Motion to Vacate Judgment and to Dismiss, and on December 9, 1943, petitioners appealed to the United States Circuit Court of Appeals for the Seventh Circuit from (a) the judgment on declaration of taking made and entered on November 12, 1942, and (b) the judgment and order made and entered on November 30, 1943, overruling and denying the Amended Motion to Vacate Judgment and to Dismiss.

The case having been duly briefed, argued and submitted, the United States Circuit Court of Appeals for the Seventh Circuit entered its judgment dismissing the appeal and in its opinion stated that "It is sufficient, and we decide nothing more, that a judgment rendered upon a Declaration of Taking is interlocutory and not subject to review." This Court duly issued its writ of certiorari and petitioners seek to have the order and judgment of the Circuit Court of Appeals reviewed and reversed.

Although the Circuit Court of Appeals refused to pass upon the merits of the appeal, your petitioners seek to have this Court not only review and reverse the order and judgment of the Circuit Court of Appeals as to the appealability of the judgment below, but also to review and decide on its merits the question presented by the said appeal. Such additional facts as may be necessary for the consideration of said appeal on its merits will be set forth in the argument.

SPECIFICATIONS OF ERROR.

The Circuit Court of Appeals erred:

(1) In holding that a judgment rendered upon a declaration of taking is interlocutory and not subject to review and in dismissing the appeal; and

(2) In failing and refusing to consider and decide said appeal on its merits and to enter its order and judgment that the petition and proceedings should be dismissed and the judgment in declaration of taking vacated.

ARGUMENT.

I.

A Judgment on a Declaration of Taking and a Subsequent Order Denying a Motion to Vacate Such a Judgment and to Dismiss the Proceedings Are Final and Appealable Within the Meaning of 28 U. S. C. A., Sec. 225 (a).

Under the provisions of the Declaration of Taking Act, 40 U. S. C. A., Section 258 (a), upon the filing by the petitioner in any condemnation proceeding instituted by and in the name of and under the authority of the United States of a Declaration of Taking and the deposit in the Court of the estimated compensation, "title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America." The Act goes on to provide that "compensation shall be ascertained and awarded in said proceeding and established by judgment therein," but makes no provision for any other judgment of the Court, interlocutory or final, with respect to the title to the land.

In its opinion the Circuit Court of Appeals held that no judgment on declaration of taking was necessary and rendered no aid to the vesting of title in the Government, since, under the statute, title automatically vested in the Government upon the filing of the declaration of taking.

The Circuit Court of Appeals went further and said in its opinion:

> "Furthermore, we are doubtful if the procurement of title by the Government under a Declaration of Taking is open to attack. It would seem that the validity of the Government's action in taking is dependent solely upon its authority to condemn. If it has the authority to condemn, there follows under the Act the absolute right to take. If there is a lack of authority to condemn, there is also a lack of authority

to take. In other words, the authority to condemn and the right to take must stand or fall together. We need not go this far, however, is deciding the question before us. It is sufficient, and we decide nothing more, that a judgment rendered upon a Declaration of Taking is interlocutory and not subject to review" (R. pp. 51-52).

It is obvious that the Circuit Court of Appeals has overlooked the fact that in the present case petitioners did challenge the Government's authority to condemn, as will be discussed more specifically in a subsequent section of this argument. Petitioners deny that the Government has the authority to condemn under the Act pursuant to which the suit was brought for the purpose for which the land was sought to be taken. The very purpose of the appeal was to obtain a decision of the Circuit Court of Appeals on the merits of this particular question. Petitioners appropriately challenged the sufficiency of the petition for condemnation to give the District Court jurisdiction to proceed by not only moving to vacate the Judgment on Declaration of Taking, but also by moving to dismiss the proceedings. The appeal was taken, not merely from the Judgment on Declaration of Taking itself, but also from the order overruling and denying petitioners' Amended Motion to Vacate Judgment and to Dismiss (R. p. 37).

It is immaterial whether or not a judgment on Declaration of Taking is required or permitted under the Act. Whether petitioners were divested of title to their land by reason of the mere filing of the Declaration of Taking or by the entry of the Judgment on Declaration of Taking or not, is of little moment. The ultimate fact is that ostensibly and of record the title to their land was taken from them and vested in the United States. If the Government had authority to condemn, if the pleadings complied with the statutes and were sufficient for the purpose, then nothing else remained to be done to finally and forever divest

petitioners of the title to their property and vest the same in the Government. Whether such passage of title occurred automatically on November 12, 1942, upon the filing of the Declaration of Taking, or a few minutes later on the same day upon the entry of a Judgment on Declaration of Taking is of no consequence. It is clear that nothing further was required in order to accomplish the transfer of title. It did not depend upon the entry of any final judgment at the conclusion of the proceedings after the making of an award as to the amount of compensation. When the petitioners, having been served by publication, long after the proceedings had been instituted and the Declaration of Taking filed and judgment entered thereon, filed their original Motion to Vacate Judgment and to Dismiss, and, subsequently, their Amended Motion to Vacate Judgment and to Dismiss, and when the Court entered its order denying said amended motion, they had challenged in an orderly way the Government's authority to condemn and the sufficiency of the proceedings, and were met with a ruling of the Court, the effect of which was to uphold the Government's authority to condemn and the sufficiency of the proceedings, and to rule that petitioners had been effectively divested of all right, title and interest in their land. So far as the title to the real estate was concerned, there was a final decision; the proceedings were at an end. The only thing that remained to be determined was the amount of the award, but any determination of that question would not and could not have any bearing upon the passage of title to the property. This was recognized by the Circuit Court of Appeals for the Seventh Circuit in its earlier decision in the case of **United States v. Sunset Cemetery Co., 132 Fed. (2d) 163**, where the Court not only held that title passed upon the filing of a Declaration of Taking, but that the Government could not itself thereafter by an amendment to the Declaration of Taking divest

itself of or destroy the title so acquired. The Court specifically held that after the filing of a proper Declaration of Taking the Court had no further jurisdiction with respect to the title to the property, saying, l. c. 165:

> "Thereafter the Court had only jurisdiction to determine what was just compensation for the tract, how much of it should pass to the owner, subject to lesser estates therein, and how much to the holder of lesser estates."

The contention that a decision such as the one in the present case is a final decision and appealable within the meaning of 28 U. S. C. A. Section 225 (a) has been upheld, expressly or by necessary implication, by three different Circuit Courts of Appeals.

In the case of **City of Oakland v. United States, 124 Fed. (2d) 959 (C. C. A. 9th, 1942)**, there was involved an appeal from a judgment entered under the same Act and under circumstances exactly parallel with those of the present case. In that case a petition for condemnation was filed on January 15, 1941, and on the same day, ex parte, a judgment of condemnation was entered. The defendant in due course filed a motion to vacate such judgment, which the trial court denied and an appeal was taken both from the judgment and from the order denying the motion to vacate the same. The Ninth Circuit Court of Appeals accepted jurisdiction and passed on the merits, although the question as to appellate jurisdiction was duly raised by the briefs. While the opinion does not discuss the question, the Second Circuit Court of Appeals, in its opinion in the case of **United States v. 243.22 Acres of Land, 129 Fed. (2d) 678**, points out, l. c. 683, that although the Court of Appeals in its opinion in the Oakland case does not mention the question of appellate jurisdiction, nevertheless, "our examination of the briefs shows that the question had been raised." Certiorari was denied, 316 U. S. 679, 62 S. Ct. 1106.

In the case of **United States v. 243.22 Acres of Land,** supra, the Second Circuit Court of Appeals discusses this question in a well reasoned opinion containing a lengthy review and discussion of the authorities, including the decision in the City of Oakland case, to which opinion we respectfully refer the Court. Again certiorari was denied by the Supreme Court, 317 U. S. 698, 63 S. Ct. 441 (Lambert v. United States).

Subsequently the First Circuit Court of Appeals in the case of **Puerto Rico Ry. Light & Power Co. v. United States, 131 Fed. (2d) 491,** was confronted with the same question, and made the same ruling, saying, l. c. 494:

> "At the outset the United States challenges our jurisdiction to entertain the appeal, on the ground that the judgment is not a 'final decision' within the meaning of Sec. 128 of the Judicial Code, 28 U. S. C. A., Sec. 225. It is said that the judgment merely determined the Government's right to condemn, leaving damages for the taking yet to be assessed, and that it is therefore not a final and appealable judgment. This contention has been squarely rejected by the Second Circuit in a careful opinion reviewing all the authorities. United States v. 243.22 Acres of Land, 2 Cir., 1942, 129 F. (2d) 678. We agree with this decision. See also City of Oakland v. United States, 9 Cir., 1942, 124 F. (2d) 959, certiorari denied 1942, 316 U. S. 679. A lengthy opinion by us on the point would therefore be superfluous. The judgment now in question is a 'final decision,' for purposes of appealability, within the principle of the following decisions of the Supreme Court: Forgay v. Conrad, 1848, 6 How. 201, 204, 12 L. Ed. 404; Thomson v. Dean, 1868, 7 Wall. 342, 345, 19 L. Ed. 94; Ex parte Farmers' Loan & Trust Co., 1889, 129 U. S. 206, 213-215, 9 S. Ct. 265, 32 L. Ed. 656; Knox National Farm Loan Ass'n v. Phillips, 1937, 300 U. S. 194, 197, 198, 57 S. Ct. 418, 81 L. Ed. 599, 108 A. L. R. 738. Luxton v. North River Bridge Co., 1893, 147 U. S. 337, 13 S. Ct. 356, 37 L. Ed. 194,

relied on by the United States, is adequately distinguished in United States v. 243.22 Acres of Land, supra, at page 682 of 129 F. (2d). We said in Hubert Hermanos, Inc., v. People of Puerto Rico, 1 Cir., 1941, 118 F. (2d) 752, 757: 'A "final decision" is not necessarily the ultimate judgment or decree complete closing up a proceeding. In the course of a proceeding there may be one or more final decisions on particular phases of the litigation, reserving other matters for future determination.' Under the earlier act of August 1, 1888, 25 Stat. 357, 40 U. S. C. A., Sections 257, 258, establishing the procedure for the judicial condemnation of land, there could be no judgment affecting title or possession until after the damages had been determined. It was the particular purpose of the Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. A., Sections 258a-258e, to sever the taking of title and possession from controversies as to valuation, and to provide a procedure whereby the United States might be speedily and conclusively vested with title and possession, with authority to demolish existing structures on the condemned land, leaving the issue as to the amount of compensation to be determined in subsequent proceedings. The judgment on the declaration of taking, having this final and immediate effect on property rights, obviously should be reviewable at once, without the necessity of awaiting the outcome of long drawn out controversies as to valuation. Therefore, on reason as well as on authority, we hold that the judgment in question is a 'final decision' within the meaning of Section 128 of the Judicial Code."

The Government, in its brief filed in the Circuit Court of Appeals and in its brief filed in this Court in opposition to the Petition for Writ of Certiorari, has cited a number of decisions, including several of this Court, to the effect that in condemnation suits an appeal may not be taken until the damages have been assessed. However, none of these cases arose under the Declaration of Taking Act, but,

as pointed out by the Second Circuit Court of Appeals in the case of **United States v. 243.22 Acres of Land**, supra, l. c. 682, arose under statutes where "there could be and there was no judgment as to title and possession until after the damages had been determined."

In view of the above, we respectfully submit that the appeal is not premature, but is from a final decision within the meaning of 28 U. S. C. A., Section 225 (a).

We realize that the Supreme Court has ruled that on a review by certiorari in a case such as this it could, but, as a matter of policy, would not, consider and decide the issue which the Circuit Court of Appeals erroneously refused to consider. **Heisler v. Thomas Colliery Co., 260 U. S. 235, 245.** However, we trust that in the present case the Court will elect to pass upon the merits of the appeal as presented to the Circuit Court of Appeals, and the rest of the Argument will be devoted to that question.

II.

The Petition for Condemnation Failed to Set Forth the Purpose for Which the Land Was Sought to Be Taken, and Hence Was Not Sufficient to Give the Court Jurisdiction of the Cause of Action, or to Support Passage of Title From Petitioners to the Government.

An examination of the original Petition for Condemnation (R. p. 2) will disclose that, while it set forth the purposes for which condemnation is authorized under the Act of Congress approved August 18, 1890 (26 Stat. 316), as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), and April 11, 1918 (40 Stat. 518), 50 U. S. C., Section 171, (a) it failed to set forth the purpose for which the property was sought to be taken or indicate that it was for any one or more or all of the purposes per-

mitted by the said Act; (b) it failed to set forth or allege that the Secretary of War had made any finding or determination that the land was needed for any one or more or all of the purposes for which condemnation is authorized by said Act, and (c) it failed to set forth or allege that the Secretary of War had requested the Attorney General of the United States to institute proceedings to acquire the land for any one or more or all of the purposes for which condemnation is authorized by the said Act.

Since the petition failed to comply with the specific requirements of the statutes, it was insufficient to give the Court jurisdiction of the cause of action or to support a passage of title from the petitioners to the Government whether by means of the filing of a Declaration of Taking or by means of the entry of a Judgment on Declaration of Taking. And in this connection it must always be borne in mind that the filing of a Declaration of Taking and the entry of a Judgment on Declaration of Taking occurred many months before petitioners had been served and were before the Court.

The Act under which the suit is brought, 50 U. S. C. A. 171, specifically provides that:

> "The Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operations of such plants; **such proceedings to be prosecuted in accordance with the laws relating to**

> **suits for the condemnation of property of the States wherein the proceedings may be instituted * * *.**" (Emphasis added.)

The laws relating to suits for the condemnation of property in the State of Illinois are found in Chapter 47, Illinois Revised Statutes, 1943, where, in Section 2, it is provided that such proceedings shall be instituted by filing "a petition setting forth, by reference, his or their authority in the premises, **the purpose for which said property is sought to be taken or damaged * * *.**"

Petitioners, having been duly served by publication, pursuant to an order of publication made and entered in the District Court on August 2, 1943, entered their appearance, and on October 7, 1943, attacked the sufficiency of the Petition for Condemnation on the grounds indicated above by filing their Motion to Vacate Judgment and to Dismiss (R. p. 29). The Government, in effect, admitted the insufficiency of the original Petition for Condemnation by asking and obtaining leave to amend the same, and filing on November 17, 1943, its Amendment to Petition for Condemnation (R. p. 31). The effect of this amendment will be discussed more fully below.

It is well established that statutes delegating the power of eminent domain must be closely followed at every step in the proceedings. Thus the Supreme Court in the case of **Cincinnati v. Vester, 281 U. S. 439**, said, l. c. 448:

> "We understand it to be the rule in Ohio, as elsewhere, that the power conferred upon a municipal corporation to take private property for public use must be strictly followed."

And in the case of **Chappell v. United States, 81 Fed. 764,** the Circuit Court of Appeals for the Fourth Circuit, discussing this very Act and another Act of Congress giving jurisdiction of condemnation proceedings to Courts of the United States only, said, l. c. 766:

> "When proceedings are taken under either of these Acts, strict compliance must be had with all the provisions of law made for the protection of the land owner or the proceedings are ineffectual; and these proceedings must show affirmatively that the requirements of the law have been fulfilled."

In the case of **United States v. 8,557.16 acres of land in Pendleton County, W. Va., 11 Fed. Supp. 311,** the Court said, l. c. 313-314:

> "In view of the fact that eminent domain statutes are construed strictly, it is absolutely necessary that these statutes be followed closely at every step of the proceeding, otherwise sovereign acquires no title to the property attempted to be condemned."

And the rule has been stated in **18 American Jurisprudence 957** in the following language:

> "As we have already seen, the extent to which the power of eminent domain may be exercised is limited to the express terms or clear implication of the statute in which the grant is contained. Where, therefore, the state, a municipality, or other agent in charge of a public use, seeks to acquire, against the consent of the owner, private property for public use, the provisions of the authorizing act must be strictly complied with, and this must appear on the face of the proceedings for taking the land."

It is likewise well settled, particularly in the State of Illinois, that a petition in conformity with the statute granting the right to condemn is necessary to give the Court jurisdiction to proceed.

Thus in the case of **Department of Public Works v. Lewis, 344 Ill. 253, 176 N. E. 345,** the Court said, l. c. 255:

> "Section 2 of Eminent Domain Act has declared specifically what facts must appear on the face of the petition where the right to take private property for

public use without the owner's consent is sought to be enforced, and **the Court or Judge is powerless to take any action in the premises until a petition is filed containing the statutory requisites, for it is by the petition that jurisdiction of the subject matter is obtained.** Every petition must therefore contain all the statutory requirements and show the authority of the petitioner to take the specific land sought to be taken and the object or purpose for which it is required." (Emphasis added.)

And in the case of **City of Mound City v. Mason, 262 Ill. 393, 104 N. E. 685,** the Court said, l. c. 394:

> "**A petition in conformity with the statute granting the right of condemnation is necessary to give the court jurisdiction to proceed under the Eminent Domain Act.** It should set forth all the facts necessary to authorize the court to act and should show a clear right to take the land sought to be taken. It should show not only that the property is wanted for a public use, but that the case is within the particular statute under which the proceedings are held." (Emphasis added.)

Again, in the case of **United States v. 8,557.16 acres of land in Pendleton County, W. Va., 11 Fed. Supp. 311,** the Court said, l. c. 314:

> "Under the petition tendered to be filed by the Government in this case on this date, I am constrained to hold the Government has not complied with the statute, that **this court has no jurisdiction under the tendered petition,** that it is the duty of the court to raise questions of jurisdiction on its own motion; therefore, said petition will not be permitted to be filed." (Emphasis added.)

The same principle has been enunciated and applied in the cases of

Harvey v. Aurora and G. Ry. Co., 174 Ill. 295, 304-305, 151 N. E. 163;

Chicago and Northwestern Railway Co. v. Galt, 133 Ill. 657, 667, 24 N. E. 674;
Smith v. Chicago and Western I. R. R. Co., 105 Ill. 511.

The District Court having acquired no jurisdiction of the subject matter of the action by the original Petition for Condemnation, then all further proceedings based upon the said petition were ineffective. This is particularly true with respect to the Declaration of Taking which was filed on November 12, 1942, and the Judgment on First Declaration of Taking entered on the same day. It must be borne in mind that the Declaration of Taking was filed pursuant to the provisions of 40 U. S. C. A. 258a, which provides that such declaration of taking may be filed "with the petition or at any time before judgment." In other words, the declaration of taking is not the petition, nor can it take the place of the petition. It may be filed simultaneously with the filing of the petition, or at any time after the petition has been filed and before judgment, **but it may not be properly filed prior to the filing of a petition which meets the statutory requirements.** Under said Section 258a the purported effect of the filing of such declaration of taking and the entry of judgment thereon is to divest petitioners of the title to their property, and to vest the same in the United States of America. Obviously, the Court has no power to divest petitioners of the title to their property, unless it has acquired jurisdiction of the subject matter of the action by the filing of a petition sufficient to give such jurisdiction.

Inasmuch as the Petition for Condemnation failed to contain any semblance of an allegation as to the purpose for which the property was sought to be taken, as required by Section 2 of Chapter 47, Revised Statutes of Illinois 1943, it is apparent that the District Court failed to acquire jurisdiction of the subject matter of the action; that the Judgment on First Declaration of Taking made and en-

tered in the District Court on November 12, 1942, was and is coram non judice, and that said judgment should have been vacated on either or both of petitioners' motions.

III.

The Petition for Condemnation, as Amended, Sets Forth the Purpose for Which the Land Was Sought to Be Taken, But the Purpose So Set Forth Is Not One of the Purposes for Which Condemnation Is Authorized by the Act Under Which the Proceeding Was Brought, and Hence the Suit Cannot Be Maintained; the Court Had No Jurisdiction of the Cause of Action; and the Proceedings Should Have Been Dismissed.

The Amendment to the Petition for Condemnation filed by the Government on November 17, 1943, cured, in part, the defect in the original petition, although it came too late to validate the Judgment on First Declaration of Taking which had been made and entered more than a year before. By this amendment the Government undertook to set forth the purpose or purposes for which the land was being taken, but instead of showing one or more of the purposes for which condemnation is authorized under the Act, pursuant to which the action was brought, on the contrary, it expressly shows on its face that the purpose for which the land is sought to be taken does not constitute one or more of the purposes recognized by the Act.

As pointed out above, the Act permits condemnation of land for (1) fortifications, (2) coast defenses, (3) military training camps, and (4) for the construction and operation of plants for (a) the production of nitrate and other compounds, (b) the manufacture of explosives and other munitions of war, and (c) for the development and transmission of power for the operations of such plants. The Amend-

ment to the Petition for Condemnation alleges, in the language of the statute, that the lands are being taken for the purposes of

> "the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operations of such plants."

If the petition had stopped there it might, under the authority of the decision in the case of **City of Oakland v. United States, 124 Fed. (2d) 959**, have been deemed sufficient, as a matter of pleading, although such an allegation would have been contrary to the actual facts. However, the Government did not stop with this general allegation, but proceeded to allege that the taking was

> "pursuant to the determination of the said Secretary of War that said lands are necessary and essential for such purposes, as is set forth in said letter of said Secretary of War, dated March 26, 1942, a certified copy of which said letter is duly filed herein simultaneously with the filing of this amendment to this petition, and is by this reference thereto incorporated herein the same as though it were set forth in full herein."

The letter so incorporated in the petition recites that

> "It is necessary that certain land located and situated in Madison County, Illinois, be acquired by the United States for use in the establishment of the Granite City Engineer Branch Depot, Granite City, Illinois,"

and that

> "You are advised that the above mentioned land is necessary to provide adequately for the establishment of a supply depot and for related military purposes."

Thus the plaintiff-appellee limited the general allegations contained in the petition and which followed the language of the statute by the specific statements in the letter.

Accordingly, the legal effect of the allegations contained in the Petition for Condemnation, thus amended, is to allege that the purposes for which the land is being taken are

> "for use in the establishment of the Granite City Engineer Branch Depot, Granite City, Illinois,"

and or

> "the establishment of a supply depot and for related military purposes."

The expression "related military purposes" must mean military purposes which are related to a supply depot. They cannot be related to anything else, and the Secretary of War is certainly not authorized nor presumably was he attempting under authority of the Act in question to condemn land for "military purposes" in general.

Neither citation of authority nor argument should be needed to demonstrate that an "engineer branch depot" or a "supply depot" does not come within any of the statutory classifications of (1) fortifications, (2) coast defenses, (3) military training camps, or (4) construction and operation of plants for (a) the production of nitrate and other compounds, (b) the manufacture of explosives and other munitions of war, and (c) for the development and transmission of power for the operations of such plants. The Government offered no evidence as to what is meant by the term "engineer branch depot" or "supply depot," nor any evidence as to what is actually being done at the Granite City Engineer Branch Depot, which was well established and had been in operation for perhaps a year or more at the time of the hearing on petitioners' Amended Motion to Vacate Judgment and to Dismiss,

although we do not admit that any such evidence would have been admissible if it had been offered.

Petitioners' Amended Motion to Vacate Judgment and to Dismiss duly raised the question as to whether or not said Petition for Condemnation, so amended, set forth a purpose or purposes within the said Act, duly raised the question as to whether or not said Petition for Condemnation, so amended, alleged that the Secretary of War had made any finding or determination that the land is needed for any one or more or all of the purposes for which condemnation is authorized by said Act, and duly raised the question as to whether or not said Petition for Condemnation, so amended, alleged that the Secretary of War had requested the Attorney General of the United States to institute proceedings to acquire the land for any one or more of the purposes for which condemnation is authorized by said Act.

Said Amended Motion to Vacate Judgment and to Dismiss was denied on November 30, 1943, from which ruling petitioners duly appealed.

In considering the correctness of this ruling two well-recognized principles of law must be borne in mind. In the first place, the authorities uniformly hold that statutes delegating the power of eminent domain are strictly construed in favor of the landowner. Thus in the case of **Northern Mining & Trading Co. v. Alaska Gold Recovery Co., 20 Fed. (2d) 5**, the Court said (l. c. 8): "Such statutes are universally construed strictly * * *."

In the case of **United States v. Rauers, 70 Fed. 748**, the rule was stated that:

> "A fundamental principle of law controlling all matters of this character is that every statute which undertakes to appropriate in any manner the property of private persons for public use must be strictly construed. One of the great aims of Government is to secure to each citizen the enjoyment of his estate. On the other hand, in cases of public necessity, the

right of the individual must yield to the right and demand of the public; but, since that demand is in derogation of private right, it must be closely scrutinized and **the expression of legislative purpose in which it is conveyed, must be strictly construed.**

"'So high a prerogative as that of divesting one's estate against his will should only be exercised where the plain letter of the law permits it, and under a careful observance of the formalities prescribed for the owner's protection.' Cooley, Const. Lim., p. 651."

And in **United States v. West Virginia Power Co. et al., 33 Fed. Supp. 756**, the Court said, l. c. 759:

"The power of eminent domain is arbitrary in character and subversive of the right of private property and before it can be exercised by any officer of the Government, its delegation to him must plainly appear and may not be deduced from any ambiguous language or by doubtful inference. **Laws authorizing public officers to exercise the sovereign power of eminent domain are strictly construed.** United States v. A Certain Tract of Land, C. C., 70 F. 940; Delaware, L. & W. R. R. v. Morristown, 276 U. S. 182, at page 192, 48 S. Ct. 276, 72 L. Ed. 523, and authorities cited therein. So it must first clearly appear from the petition that the federal officers are authorized to institute this proceeding and upon what that authority is based. Dept. Public Works v. Lewis, 344 Ill. 253, 176 N. E. 345."

And in **18 American Jurisprudence 650**, the rule was stated:

"A grant of the power of eminent domain, which is one of the attributes of sovereignty most fraught with the possibility of abuse and injustice, will never pass by implication; and when the power is granted, the extent to which it may be exercised is limited to the

express terms or clear implication of the statute in which the grant is contained. In other words, **statutes conferring the power must be strictly construed.** Clear legislative authority must be shown to justify the taking. Authority cannot be implied or inferred from vague or doubtful language. When the matter is doubtful, it must be resolved in favor of the property owner."

Similar statements and applications of the rule may be found in

Delaware, L. & W. R. Co. v. Morristown, 276 U. S. 182, 192;
United States v. Certain Tract of Land, 70 Fed. 940, 943;
United States v. Threlkeld, 72 Fed. (2d) 464, 466;
Harvey v. Aurora & Geneva Ry. Co., 174 Ill. 295, 51 N. E. 163;
29 Corpus Juris Secundum 806, 1135.

In the second place, it is well established that the right of the United States to maintain its suit having been appropriately questioned, the burden was upon the United States to establish its lawful right to maintain the suit.

In **United States v. Sixty Acres etc., 28 Fed. Supp.** 368, the Court expressed this principle as follows:

"In view of the fact that the motion to dismiss involves the lawful right of the petitioner to proceed by way of condemnation under the law of eminent domain, **the petitioner,** under applicable law, **has the burden of establishing its lawful right to proceed.**"

And in the case of **United States v. Eighty Acres etc., 26 Fed. Supp. 315,** the same principle was expressed by the same Court as follows:

> "The right of the plaintiff to maintain the suit having been attacked by the defendants upon the grounds that plaintiff is without lawful authority to condemn the land in question and is seeking to take the land by right of eminent domain for an unauthorized purpose, **the burden was upon the plaintiff to establish its lawful right to maintain its suit.**"

In Illinois and in all procedural matters the case is governed by the laws of that state, this rule has been enunciated in the case of **Department of Public Works v. Lewis, 344 Ill. 253, 176 N. E. 345**, where the Court said, l. c. 255:

> "While no plea or answer is required of the property owner he has the undoubted right to contest the petitioner's right to condemn, and this he may do by motion to dismiss, **and when he does so the burden is thrown upon the petitioner to maintain its right by proper proof.**"

And again in the case of **Lieberman v. Chicago R. T. R. Co., 141 Ill. 140, 30 N. E. 544**, the Court said, l. c. 144:

> "The property owner has the undoubted right to controvert the petitioner's right to condemn, and when he does so **the burden is thrown on the petitioner to maintain its right by proper proofs.**"

Applying these principles to the present case, we find that the Act under which this proceeding is brought designates specifically and precisely the purposes for which the Secretary of War may institute condemnation proceedings. But nowhere in the statutes do we find that the Secretary of War is authorized to institute proceedings to condemn land for "engineer branch depots" or "supply depots" or for "related military purposes."

Nor did the Government make any effort to meet the burden which was placed upon it by the filing of Peti-

tioners' Amended Motion to Vacate Judgment and to Dismiss by showing that an "engineer branch depot" or a "supply depot" is a fortification, coast defense, a military training camp, a plant for the production of nitrate and other compounds, a plant for the manufacture of explosives and other munitions of war, or has anything to do with the development and transmission of power for the operations of such plants. From the silence of the Government counsel in this respect, we are justified in assuming that they recognized (a) that such evidence, if available, would be inadmissible, and/or (b) that no such evidence was or could be made available.

In its brief filed in the Court of Appeals the Government rested its argument with respect to the statutory authorization for the present condemnation proceedings upon the proposition that because an engineer branch depot, which is essentially nothing more or less than a warehouse, contains certain equipment and supplies which are ultimately distributed to the armed services, and by them used, perhaps in Italy, India or New Guinea, for the construction of fortifications, the land on which such a depot is to be constructed is needed for the "prosecution of works for fortifications."

In making such contention, the Government misconstrued the meaning of the term "works" as used in the statute. Although the Government cited the case of Ex Parte Hall, 1 Pick. 261 (Mass. 1823), in which it is said that "in a statute which applies to military matters, the language therein will be given the military significance" and the case of City of Richmond v. Richmond & Danville R. R. Co., 21 Gratt. 604, 6[illegible]3 (Va. 1872), in which it is said with respect to the word "works" that "In military engineering, it means fortresses, fortifications, ramparts, bastions, and the like," it utterly ignored these definitions and sought to interpret the term "works" as if it were singular

nd not plural, and as if it applied to the work incidental
o the construction of fortifications, rather than to the
ortifications themselves.

The Government would have the language "prosecution
f works for fortifications" mean the doing of any work
hich has any bearing, no matter how remote in space
r in time, upon the erection or construction of fortifica-
ons. But, as Webster's New International Dictionary
efines the term "works," in a military sense, it means:

> "A series or set of fortified structures, as trenches or earthern barricades (See Work, n., 17)."

nd referring to the noun "work" we find:

> "17. Fort. A fortified structure of any kind, as a building, fort, earthen barricade, trench, etc. An **open work** gives protection only on the side of the enemy's approach; whereas a **closed work** offers protection against a hostile approach from any direction."

t is clear that the word "works" as used in the statute
nd in a military sense refers to the structures or devices
hich are to serve as fortifications and not to the labor
hich is exerted in their construction. Thus the statute
uthorizes the condemnation of land which is needed for
he site, location, construction or prosecution of fortresses,
amparts, bastions, trenches, earthen barricades, build-
gs, and the like which are designed for or as fortifica-
ons. Clearly the Granite City Engineer Branch Depot,
ven as its use and function has been described in the Gov-
rnment's brief, but without supporting evidence, does not
onstitute a fortification or any structure used or designed
or a fortification of any kind or character whatsoever.

As the Government sought to construe the statute, any-
ing which might ultimately contribute to the labor used

in the construction of a fortification in any corner of the globe would constitute "works for fortifications." On this theory, the drawing of plans and designs would constitute "works for fortifications" and hence the Government could condemn an office building. Likewise the transporting of tools and equipment to be used for such purpose would constitute "works for fortifications" and the Government could condemn trucks, railroads, steamships or any other means of transportation. Since fortifications can only be built by men, and men need food, clothing and shelter, the Government could condemn a canning factory, a clothing factory, and a residence, apartment building or hotel, all on the theory that such comes within the meaning of the "prosecution of works for fortifications."

No such strained or farfetched construction of the statute is called for or justified. In the military sense, as contended for by the Government, "works" for fortifications constitute structures or devices intended to be used for fortifications. They are the fortifications themselves, and not the "work" or labor which is done in connection with the erection or construction of fortifications.

On the record thus presented, it is apparent that the Petition for Condemnation, as amended, did not set forth facts sufficient to authorize condemnation under the Act, pursuant to which it was brought, but, on the contrary, expressly showed on its face that the purpose for which the land was and is sought to be taken did not and does not constitute one or more of the purposes for which condemnation proceedings may be instituted under said Act;

that the suit cannot be maintained; that the Court had no jurisdiction over the subject matter of the action; and that the petition and proceedings should be dismissed.

Respectfully submitted,

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FILE COPY

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DANIEL [redacted] PETITIONER AND LEWIS M. [redacted] UNITED STATES DISTRICT JUDGE FOR THE [redacted] DISTRICT OF [redacted]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES [redacted] COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 419

DANIEL K. CATLIN, FREDERICK PITZMAN AND LEWIS M. RUMSEY, JR., AS TRUSTEES UNDER DEED DATED FEBRUARY 1, 1921, AND RECORDED IN THE PUBLIC RECORDS OF MADISON COUNTY, ILLINOIS, IN BOOK 471, AT PAGE 621, COMMONLY KNOWN AS THE COOL LAND SYNDICATE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 47–52) is reported in 142 F. 2d 781. The district court wrote no opinion.

JURISDICTION

The judgment of the circuit court of appeals sought to be reviewed was entered on June 2,

1944 (R. 52). The petition for a writ of certiorari was filed on September 1, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a judgment on a declaration of taking and a subsequent order denying a motion to vacate such a judgment were final and appealable, particularly where the Government, by virtue of war statutes, was already in possession of the property at the time the declaration of taking was filed, and, if so, whether the appeal was timely.

STATUTES INVOLVED

Section 128 of the Judicial Code, as amended (28 U. S. C. 225 (a)), the Declaration of Taking Act of February 26, 1931 (40 U. S. C. 258a–258e), and the "War Purposes Act of 1917" (50 U. S. C. 171), are printed in the Appendix, *infra*, pp. 19–23.

STATEMENT

The United States on March 31, 1942, instituted condemnation proceedings under the "War Purposes Act of 1917" [1] to acquire 1,113 acres of land in Madison County, Illinois, "for use in the establishment of the Granite City Engineer Branch Depot, Granite City, Illinois" (R. 2–11, 33). The

[1] Act of August 18, 1890, 26 Stat. 316, as amended by the Acts of July 2, 1917, 40 Stat. 241, and April 11, 1918, 40 Stat. 518 (50 U. S. C. 171).

petition for condemnation alleged that it was being filed at the direction of the Attorney General, pursuant to the request of the Secretary of War (R. 2, 3); that the Act of August 18, 1890, as amended in 1917 and 1918 (50 U. S. C. 171), authorized the Secretary of War to cause proceedings to be instituted to condemn land "needed for the site, location, construction and prosecution of works for fortifications, coast defenses, military training camps," etc. (R. 3); that upon the filing of a petition to acquire such lands in time of war "immediate possession thereof may be taken" (R. 3); that funds for the acquisition of lands needed "for the prosecution of military affairs of the United States in connection with the present emergency" had been appropriated by the Act of December 17, 1941, 55 Stat. 810, 812 (R. 3); and that the apparent owners of the property being condemned included the Cool Land Syndicate (R. 4). The petition concluded with a prayer that the court enter an order of immediate possession and that just compensation be ascertained (R. 4–5). The court on the same day that the petition was filed entered an order of immediate possession. The War Department thereupon went into possession of the property and proceeded with the construction of an Army Engineer Branch Depot. (R. 13, 47.)

Thereafter, as the necessary appraisal data and title information were obtained, declarations of taking were signed by the Secretary of War and

filed in court, pursuant to the Declaration of Taking Act of February 26, 1931 (40 U. S. C. 258a). Included in Declaration of Taking No. 1, filed November 12, 1942, was Tract ED–7 containing 318.64 acres for which $43,579 was deposited in court as estimated compensation. (R. 13, 16, 21.) The Cool Land Syndicate was named as the purported owner (R. 16). The court on November 12, 1942, entered a "judgment" on this declaration of taking, decreeing that title to the tracts therein described had vested in the United States upon the filing of the declaration of taking and that "the right to just compensation for the same is now vested in the persons entitled thereto." This judgment provided that "this cause is held open for such further and other orders, judgments and decrees as may be necessary and proper in the premises". (R. 23–26.)

Approximately 11 months later the petitioners, as trustees of the Cool Land Syndicate, filed a motion asking the court to vacate the judgment on this declaration of taking and to dismiss the petition in condemnation, insofar as it related to Tract ED–7, on the ground that the requisite jurisdictional facts and statutory authority had not been sufficiently alleged in the condemnation petition (R. 29–31).

Although of the opinion that the original petition was adequate, the Government asked and obtained leave to amend the petition so as to make

the Secretary of War's letter of March 26, 1942, to the Attorney General, a part thereof (R. 31–34). Petitioners thereupon filed an amended motion to vacate and to dismiss, which was based solely upon the ground that, it appearing from the Secretary's letter that the land was to be used for the establishment of an engineer depot and "related military purposes," the proceeding did not involve a condemnation for one of the purposes specified in the "War Purposes Act of 1917" (R. 34–36). The amended motion was denied on November 30, 1943 (R. 37).

Petitioners, on December 9, 1943, took an appeal to the Circuit Court of Appeals for the Seventh Circuit from the judgment on the declaration of taking and from the subsequent order denying their motion to vacate that judgment. The appellate court held that the orders attacked were not final judgments and accordingly dismissed the appeal (R. 47–52).

ARGUMENT

1. Except in situations not here material, the jurisdiction of the federal appellate courts is by statute limited to the review of "final decisions," 28 U. S. C. 225 (a). A "final decision" is one that terminates the litigation on the merits and leaves nothing for the trial court to do but execute the judgment in case of affirmance. *St. Louis I. M. & S. R. R. Co.* v. *Southern Ex. Co.*, 108 U. S. 24, 28; *State of Washington* v. *United*

States, 87 F. 2d 421, 433 (C. C. A. 9). Consequently, a condemnation proceeding is not reviewable "until after final judgment, disposing of the whole case, and adjudicating all the rights, *whether of title or of damages*, involved in the litigation. The case is not to be sent up in fragments * * *." [Italics supplied.] *Luxton* v. *North River Bridge Co.*, 147 U. S. 337, 341; *Southern Ry. Co.* v. *Postal Telegraph Co.*, 179 U. S. 641, 643; *Grays Harbor Co.* v. *Coats-Fordney Co.*, 243 U. S. 251, 256; *Wick* v. *Superior Court*, 278 U. S. 574, 575; *Washington ex rel. McPherson Bros. Co.* v. *Superior Court*, 274 U. S. 726; *Washington ex rel. Perry* v. *Superior Court*, 276 U. S. 626; *Ornstein* v. *Chesapeake & Ohio Ry. Co.*, 284 U. S. 572; *Public Service Co.* v. *Lebanon*, 305 U. S. 558, 671; *Dade County, Fla.* v. *United States*, 142 F. 2d 230 (C. C. A. 5); *Dieckmann* v. *United States*, 88 F. 2d 902 (C. C. A. 7); *Turnbull* v. *United States*, 139 F. 2d 126 (C. C. A. 6); cf. *Collins* v. *Miller*, 252 U. S. 364, 370; *United States* v. *Florian*, 312 U. S. 656.

In many States "judgments of condemnation" sustaining the condemnor's right to acquire particular property by condemnation are by reason of special statutes reviewable in the state courts in advance of the determination of just compensation. But neither state statutes nor the conformity provisions of the federal condemnation acts abrogate the plain requirements of the Judicial

Code limiting review by the Federal courts to "final decisions." *Dieckmann* v. *United States,* 88 F. 2d 902 (C. C. A. 7). Consequently this Court has repeatedly refused to review such state court decisions, in advance of a remand for determination of just compensation, "for want of a final judgment." E. g. *Wick* v. *Superior Court,* 278 U. S. 574, 575; *Public Service Co.* v. *Lebanon,* 305 U. S. 558, 671. Since just compensation for Parcel ED–7 has not yet been determined, it seems clear, under the foregoing authorities, tha the judgment and order sought to be reviewed are not final and appealable.,

Certainly, an order denying a motion to dismiss a complaint in an ordinary civil action is not immediately reviewable even when the motion is based on jurisdictional grounds. *Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21. And an order denying a motion to dismiss a condemnation petition, even where constitutional objections are raised, cannot be deemed a final judgment. *Dieckmann* v. *United States,* 88 F. 2d 902 (C. C. A. 7). Such a motion is comparable to a demurrer at common law and when overruled is not reviewable until a final judgment has been entered. Otherwise a litigant, each time that he was dissatisfied with a ruling made in the course of a particular proceeding, could file a motion to set aside the objectionable ruling, and, when that motion was denied, he could prosecute a piece-meal

appeal. It is only when the motion to set aside is directed at a judgment which is itself final that an appeal may be immediately taken. *Glinski* v. *United States,* 93 F. 2d 418 (C. C. A. 7); *Republic Supply Co. of California* v. *Richfield Oil Co.,* 74 F. 2d 909, 910 (C. C. A. 9). Therefore, the order of November 30, 1943, insofar as it denied petitioners' motion to dismiss the condemnation petition, cannot be deemed a final and reviewable judgment. If a review is to be had at this time, it can only be on the theory that the judgment which the court entered on the declaration of taking in November 1942 was itself final and appealable and that the order of November 30, 1943, denying a motion to vacate such judgment is likewise final and appealable.

We submit, for reasons now to be discussed, that a so-called judgment on a declaration of taking is not a "final decision" as that term is used in 28 U. S. C. 225 (a). The Declaration of Taking Act contains no provision requiring the court to enter a "judgment" or "order" on a declaration of taking. The Act provides that "upon the filing of said declaration of taking and of the deposit in the court, * * * title to the said lands * * * shall vest in the United States of America." "Clearly under provisions of the statute, condemnation is effected and title completely vested in the Government by the mere filing of a declaration of taking and a judgment adjudging title in the

United States is wholly unnecessary. Such is the statutory mandate." *United States* v. *Sunset Cemetery Co.*, 132 F. 2d 163, 164 (C. C. A. 7); *Dade County, Fla.*, v. *United States*, 142 F. 2d 230, 231 (C. C. A. 5). But in the interests of orderly procedure, the Department of Justice has adopted the policy of asking district courts to enter a "judgment on the declaration of taking." Most district judges have complied. This "judgment" is obtained, generally *ex parte*, so as to advise the owners of the action that has been taken and for title recordation purposes. Thus, the Act does not even provide for a judgment on a declaration of taking and, of course, it makes no provision for an interlocutory appeal. On the contrary, it provides that the declaration may be filed "at any time before judgment" and that "compensation shall be ascertained and awarded in said proceeding and established by judgment therein." The statute further provides that if the amount of the final award exceeds the deposit, "the court shall enter judgment against the United States for the amount of the deficiency." Subsequent sections of the Act (40 U. S. C. sec. 258d, e) refer to taking possession and title "in advance of *final judgment* in condemnation proceedings" and the Act is entitled (46 Stat. 1421) "An Act to expedite the construction of public buildings and works outside of the District of Columbia by enabling possession and title of sites to be taken in advance of *final*

judgment in proceedings for the acquisition thereof under the power of eminent domain." [Italics supplied.] Thus, the only judgment referred to in the statute is the usual final condemnation judgment entered after compensation has been determined.

These provisions of the Declaration of Taking Act make it clear that Congress did not intend a different rule of appealability to prevail in those cases where a declaration of taking is used than that followed in the usual condemnation case, where no appeal will lie until just compensation has been ascertained. *Dade County, Fla.* v. *United States,* 142 F. 2d 230, 231 (C. C. A. 5). The final judgment contemplated by the Act is the one determining the deficiency due the condemnee or, if the deposit was too high, the amount which should be refunded to the United States. *United States* v. *Miller,* 317 U. S. 369; *Garrow* v. *United States,* 131 F. 2d 724 (C. C. A. 5), certiorari denied, 318 U. S. 765.

As this Court has recently emphasized, the mere fact that the rule limiting appeals to final judgments may result in inconvenience and unnecessary trials, if it is ultimately decided that the district court erred, constitutes no proper ground for permitting preliminary and piecemeal appeals. To do so would be a plain evasion of the congressional enactment limiting review to "final de-

isions." *Roche* v. *Evaporated Milk Assn.*, 319 S. 21, 30. There are strong policy considera-ions in condemnation cases which support the imitation of appeal to the judgment rendered fter just compensation has been determined. At-acks upon the Government's power to condemn ave very rarely been successful.[2] In the great ajority of the cases, to permit appeals from judgments" entered upon declarations of taking ould result simply in multiplying appeals[3] and nnecessary delay in the entry of the concluding

[2] The decision in *Puerto Rico Railway Light and Power o.* v. *United States*, 131 F. 2d 491 (C. C. A. 1), where the urt entertained an appeal, did not result in ousting the overnment, because immediately after the decision the roperty was taken under the Second War Powers Act. The resent petitioners conceded in the court below that the Gov-rnment could undoubtedly acquire the property here in-olved for the use in question under the Second War Powers ct (Act of March 27, 1942, 56 Stat. 177, 50 U. S. C. App. upp. III, 632), a statute which was on the books when the stant proceeding was filed. Therefore, even if this case ere reversed, possession could be retained by amending the leadings to involve specifically the Second War Powers Act.

[3] In order to cut down liability for interest and to provide he dispossessed landowner with some money pending the udicial determination of just compensation, it is the practice f the Government to file declarations of taking in most con-emnation proceedings. If judgments on such declarations f taking are held to be appealable, considering the present uantity of land now being condemned for war purposes, he appellate courts will be confronted with scores of needless iecemeal appeals. We have found that where the ultimate ward is satisfactory to the condemnees numerous technical bjections are never pressed.

judgments.[4] Such delays in ascertaining compensation should be avoided. Neighboring witnesses for the landowner and expert witnesses for the Government who saw the property before the improvements were made may be difficult to locate when the case finally comes on for trial. Moreover, during the period of delay the landowner is deprived of compensation except for the amount deposited with a declaration of taking and the United States is forced to pay 6 percent interest on the amount by which the award exceeds the deposit. It is thus advantageous both to the Government and to the owners that appeals should not be permitted until the ultimate judgment is entered.

Although the decisions of this Court and the Declaration of Taking Act itself seem to indicate that a so-called judgment on a declaration of taking is not final and appealable, yet, as peti-

[4] This case is an example of the delay which results. The judgment on the declaration of taking was entered on November 12, 1942 (R. 23). The order refusing to vacate the judgment on the declaration of taking was entered on November 30, 1943, in response to a motion made eleven months after the judgment was entered (R. 36). The issue of just compensation was to be heard at a trial set for December 20, 1943. On December 9, 1943, petitioners filed their notice of appeal (R. 37), thus necessitating a postponement of the valuation trial. Had they waited until after that trial, all reviewable issues could have been heard on a single appeal. As it is, if certiorari should be granted and disposed of in regular course, it is unlikely that the question of valuation will be determined until late in 1945.

tioners have indicated, three circuit courts of appeal have permitted condemnees to take appeals in advance of the determination of just compensation. *City of Oakland* v. *United States*, 124 F. (2d) 959 (C. C. A. 9), certiorari denied, 316 U. S. 679; *United States* v. *243.22 Acres of Land*, 129 F. 2d 678 (C. C. A. 2), certiorari denied, 317 U. S. 698; *Puerto Rico Railway Light and Power Co.* v. *United States*, 131 F. 2d 491 (C. C. A. 1). However, those decisions are not necessarily in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Dade County, Fla.* v. *United States*, 142 F. 2d 230, nor with that of the Circuit Court of Appeals for the Seventh Circuit in the instant case (R. 47–52). In the three cases on which petitioners rely to establish a conflict (Pet. 9, 13–21) the Government resorted to the Declaration of Taking Act in order to obtain possession of the property. The judgments on the declarations of taking there appealed from contained court orders granting the Government possession. As indicated in the *Dade County* case (142 F. 2d at 231), the Declaration of Taking Act brings into play the interposition of the District Court before the Government can obtain possession and hence involves judicial action. But in the *Dade County* case and in the instant case judicial permission was not required for the taking of possession. The Government was already in possession of the

property under war statutes where no court orders granting possession are required, with authority to commence immediate construction. Second War Powers Act of March 27, 1942 (50 U. S. C. App. 632); War Purposes Act of 1917 (50 U. S. C. 171); *Dade County, Fla.* v. *United States*, at p. 231; *United States* v. *Merchants Transfer & Storage Company* (C. C. A. 9); see R. 47. In such cases declarations of taking are filed after possession has been obtained primarily for the purpose of providing the landowner with some compensation on account, and thus reducing the interest liability of the United States. See *United States* v. *Miller*, 317 U. S. 369, 381. Hence, the judgments on the declarations of taking in the *Dade County* case and in the instant case, unlike those involved in the First, Second, and Ninth Circuit cases, did not operate to deprive the landowners of any possessory rights. Therefore, the alleged conflict on which petitioners rely for the granting of certiorari does not, we think, really exist. It seems clear that "judgments" on declarations of taking are not appealable in the situations presented by the *Dade County* case and the instant case, where the Government was already in possession of the property under other statutes. The determination as to whether judgments on declarations of taking are or are not final in situations like those involved in the First, Second, and Ninth Circuit cases may well await

a case where the possession is transferred by judicial action pursuant to the Declaration of Taking Act.

Moreover, if petitioners were right in their conclusion that the "judgment" on the declaration of taking in the instant case was a final decision, it would seem evident that their appeal is not timely. That judgment was entered on November 12, 1942. The appeal was not taken until December 9, 1943, months after the prescribed three months appeal period (28 U. S. C. 230) had expired. The Civil Procedure Rules not being applicable,[5] this final "judgment" remained within the breast of the court only during the term at which it was entered. See *United States* v. *Mayer*, 235 U. S. 55, 67, and cases cited. Several terms of court passed before, eleven months later, the motion to vacate was filed (see R. 1, 2, 23, 29; cf. 28 U. S. C. 152).[6] This motion, consequently,

[5] Rule 81 (a) (7) provides that "in proceedings for condemnation of property under the power of eminent domain, these rules govern appeals but are not otherwise applicable.

[6] While the "judgment" on the declaration of taking provided that "this cause is held open for such further and other orders, judgments, and decrees as may be necessary and proper in the premises" (R. 26), it would not seem that this reservation held open the term at which the "judgment" on the declaration of taking was entered for the purpose of an attack upon that "judgment." The judgment merely confirmed that which had already occurred irrespective of the judgment. The Government had taken possession of the property under the War Purposes Act of 1917, and title had passed to it upon the filing alone of the declaration of taking accompanied by the deposit in court of the estimated com-

did not suspend the "finality" of the judgment of November 12, 1942. The District Courts have jurisdiction of suits "brought by the United States" (28 U. S. C. 41(1)), and the attack upon the judgment in petitioner's motion to vacate, as finally amended, was solely that the court should have held that there was no right to condemn in the particular case. Consequently there is not involved a situation of a void judgment but at most a judgment which was claimed to be erroneous. Since the running of the appeal period was not delayed by the motion to vacate, the appeal is, we submit, untimely even if petitioners' argument as to the finality of the judgment were accepted.

2. Additionally, the question on the merits which petitioners sought to have decided in the court below is, we think, sufficiently without substance as to have warranted a dismissal of the appeal upon that ground. Sites for engineer supply depots—which receive, collect, and distribute to our troops on various battle fronts the supplies and equipment required in digging foxholes and trenches, constructing pill boxes, gun emplacements, etc.—would certainly seem to be acquirable under a war statute authorizing the condemnation of land "needed for the * * * prosecution of

---

pensation. The "further orders, judgments, and decrees" for which the cause was held open related undoubtedly to those orders, judgments, and decrees which would deal with the determination and distribution of just compensation.

works for fortifications." 50 U. S. C. 171; *City of Richmond* v. *Richmond & Danville R. R. Co.*, 21 Gratt. 604, 608 (Va. 1872); *Dictionary of United States Army Terms*, War Department Technical Manual TM 20–205 (1944), defining "fortification," "field fortification"; *Modern Military Dictionary*, Garber and Bond (2d ed. 1942), defining "works," "field fortification," "field fortification, items of"; Army Regulations 700–10, sec. I, par. 2 (1936), defining "arm or service depots." The statute itself recognizes an urgency in time of war by permitting immediate possession, use, and occupancy of the land for "military purposes." It does not contemplate, obviously, that the Secretary of War should be held to a nice discrimination in definition. Certainly, only in a most flagrant situation would his judgment be subject to judicial reversal (cf. *United States* v. *243.22 Acres of Land*, 129 F. 2d 678, 683 (C. C. A. 2), certiorari denied, 317 U. S. 698). This is not such a case.

Moreover, the Second War Powers Act of March 27, 1942 (50 U. S. C., App. Supp. III, 632), which amended the War Purposes Act of 1917, although not referred to in the Government's petition for condemnation, was in effect when that petition was filed. It authorizes "The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation" to institute condemnation proceedings

to acquire property that shall be deemed necessary "for military, naval, or other war purposes" and provides for immediate possession and occupancy, use, and improvement of the property. Petitioners conceded below that this statute would have justified the taking. Furthermore, it was not the purpose of that Act to enlarge in any essential respect the *basic powers* of the *Secretary of War* under the 1917 Act, but merely to extend them to other war agencies. S. Rep. No. 989, 77th Cong., 2d sess. (1942), p. 4.

CONCLUSION

The decision of the circuit court of appeals is correct and there is no real conflict of decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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OCTOBER 1944.

APPENDIX

Section 128 of the Judicial Code, 28 U. S. C. 225 (a) provides:

> The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—
>
> First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title.

The Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. 258a–258e, provides:

> CHAP. 307.—
>
> An Act To expedite the construction of public buildings and works outside of the District of Columbia by enabling possession and title of sites to be taken in advance of final judgment in proceedings for the acquisition thereof under the power of eminent domain.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby

taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

SEC. 2. No appeal in any such cause nor any bond or undertaking given therein shall operate to prevent or delay the vesting of title to such lands in the United States.

SEC. 3. Action under this statute irrevocably committing the United States to the payment of the ultimate award shall not be taken unless the chief of the executive department or agency or bureau of the Government empowered to acquire the land shall be of the opinion that the ultimate award probably will be within any limits prescribed by Congress on the price to be paid.

SEC. 4. The right to take possession and title in advance of final judgment in condemnation proceedings as provided by this Act shall be in addition to any right, power,

or authority conferred by the laws of the United States or those of any State or Territory under which such proceedings may be conducted, and shall not be construed as abrogating, limiting, or modifying any such right, power, or authority.

SEC. 5. In any case in which the United States has taken or may take possession of any real property during the course of condemnation proceedings and in advance of final judgment therein and the United States has become irrevocably committed to pay the amount ultimately to be awarded as compensation, it shall be lawful to expend moneys duly appropriated for that purpose in demolishing existing structures on said land and in erecting public buildings or public works thereon, notwithstanding the provisions of section 355 of the Revised Statutes of the United States: *Provided,* That in the opinion of the Attorney General, the title has been vested in the United States or all persons having an interest therein have been made parties to such proceeding and will be bound by the final judgment therein.

The pertinent portions of the "War Purposes Act of 1917", 50 U. S. C. 171, reads as follows:

The Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the con-

struction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operations of such plants; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: * * * *And provided further,* That when such property is acquired in time of war, or the imminence thereof, upon the filing of the petition for the condemnation of any land, temporary use thereof or other interest therein or right pertaining thereto to be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes.

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 419

DANIEL K. CATLIN, FREDERICK PITZMAN AND LEWIS M. RUMSEY, JR., AS TRUSTEES UNDER DEED DATED FEBRUARY 1, 1921, ETC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 47–52) is reported at 142 F. 2d 781. The District Court wrote no opinion.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 2, 1944 (R. 52). The petition

for a writ of certiorari was filed on September 1, 1944, and was granted on October 23, 1944 (R. 60). The jurisdiction of this Court rests on section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a judgment on a declaration of taking and a subsequent order denying a motion to vacate such a judgment and dismiss the condemnation petition are final and appealable.

STATUTES INVOLVED

Section 128 of the Judicial Code, as amended (28 U. S. C. 225 (a)), the Declaration of Taking Act of February 26, 1931 (40 U. S. C. Secs. 258a–258e), and the War Purposes Act of 1917 as amended (50 U. S. C. 171), are printed in the Appendix, *infra*, pp. 21–25.

STATEMENT

The United States on March 31, 1942, instituted condemnation proceedings under the War Purposes Act of 1917[1] to acquire 1,113 acres of land in Madison County, Illinois, "for use in the establishment of the Granite City Engineer Branch Depot, Granite City, Illinois" (R. 2–11, 33). The petition for condemnation alleged that it was being filed at the direction of the Attorney General,

[1] Act of August 18, 1890, 26 Stat. 316, as amended by the Acts of July 2, 1917, 40 Stat. 241, and April 11, 1918, 40 Stat. 518 (50 U. S. C. 171).

pursuant to the request of the Secretary of War (R. 2, 3); that the Act of August 18, 1890, as amended in 1917 and 1918 (50 U. S. C. 171), authorized the Secretary to cause proceedings to be instituted to condemn land "needed for the site, location, construction and prosecution of works for fortifications, coast defenses, military training camps," etc. (R. 3); that upon the filing of a petition to acquire such lands in time of war "immediate possession thereof may be taken" (R. 3); that funds for the acquisition of lands needed "for the prosecution of military affairs of the United States in connection with the present emergency" had been appropriated by the Act of December 17, 1941, 55 Stat. 810, 812 (R. 3); and that the apparent owners of the land needed for "the works hereinabove referred to" included the Cool Land Syndicate (R. 4). The petition concluded with a prayer that the court enter an order of immediate possession and that just compensation be ascertained (R. 4–5). The court on the same day that the petition was filed entered an order of immediate possession. The War Department thereupon went into possession of the property and proceeded with the construction of an Army Engineer Branch Depot (R. 47).

Thereafter, as the necessary appraisal data and title information were obtained, declarations of taking were signed by the Secretary of War and filed in court, pursuant to the Declaration of Tak-

ing Act of February 26, 1931 (40 U. S. C. 258a). Included in Declaration of Taking No. 1, filed November 12, 1942, was Tract ED–7, containing 318.64 acres, for which $43,579 was deposited in court as estimated compensation. (R. 13, 16, 21.) The Cool Land Syndicate was named as the purported owner (R. 16). The court on November 12, 1942, upon motion of the United States Attorney, entered a "judgment" on this declaration of taking, decreeing that title to the tracts therein described had vested in the United States upon the filing of the declaration of taking and that "the right to just compensation for the same is now vested in the persons entitled thereto." This judgment further provided that "this cause is held open for such further and other orders, judgments and decrees as may be necessary and proper in the premises." (R. 23–26.)

On October 7, 1943, the petitioners, as trustees of the Cool Land Syndicate, filed a motion asking the court to vacate the judgment on this declaration of taking and to dismiss the petition in condemnation, insofar as it related to Tract ED–7, on the ground that the requisite jurisdictional facts and statutory authority had not been sufficiently alleged in the condemnation petition (R. 29–31).

Although of the opinion that the original petition was adequate, the Government asked and obtained leave to amend the petition so as to make the Secretary of War's letter of March 26, 1942,

to the Attorney General, a part thereof (R. 31–34). Petitioners thereupon filed an amended motion to vacate and to dismiss, which was based solely upon the ground that, it appearing from the Secretary's letter that the land was to be used for the establishment of an engineer depot and "related military purposes," the proceeding did not involve a condemnation for one of the purposes specified in the War Purposes Act of 1917 (R. 34–36). The amended motion was denied on November 30, 1943 (R. 36).

Petitioners, on December 9, 1943, took an appeal to the Circuit Court of Appeals for the Seventh Circuit from the "judgment" on the declaration of taking and from the subsequent order denying their motion to dismiss the petition and to vacate that judgment. That court held that the orders attacked were not final judgments and accordingly dismissed the appeal. (R. 47–52.)

SUMMARY OF ARGUMENT

An appeal does not lie from a "judgment" upon a declaration of taking or the other actions of the trial court in this case, because the jurisdiction of Federal appellate courts is limited to the review of "final decisions" by Section 128 of the Judicial Code, and neither the "judgment" nor the other actions of the court were final. The litigation was not terminated and the amount of compensation to the landowner was not determined. This Court and other Federal courts have fre-

quently held that a judgment in a condemnation proceeding is not reviewable until all the rights, "whether of title or of damages", have been adjudicated. Such has been the holding with respect to the reviewability in this Court of the judgments of state courts which do not conclude the issue of compensation, even when, by statute, they have been appealed to the highest state courts.

The Declaration of Taking Act does not provide for judgments upon declarations, but causes title to vest in the United States immediately upon the filing of a declaration and the deposit of the estimated amount of compensation. "Judgments" are frequently obtained *ex parte*, to advise landowners of the action taken and for title recordation purposes, but such a "judgment" determines nothing that the filing of the declaration, accompanied by the deposit of estimated compensation, has not already concluded. There is no final judgment in such a proceeding other than the final award of compensation.

The Declaration of Taking Act was intended to conclude the landowner with respect to the taking, except as review in connection with the final judgment or non-statutory relief might be had. These remedies afford adequate protection. The validity of such summary procedure has long been settled. The fact that the United States may enter immediately into possession upon the filing of a declaration of taking does not afford a

reason for holding that the "judgment" upon such a declaration is reviewable; for immediate possession may be taken under other procedures and resulted in this case from the filing of the petition and not from the declaration or the "judgment". Accordingly, the rationale of the cases which hold that a "judgment" upon a declaration of taking or its equivalent is reviewable because the landowner should have an opportunity promptly to challenge the possession is unsound.

The Declaration of Taking Act contains ample internal evidence that the only judgment contemplated is the final award of compensation for the property taken. There are strong practical considerations to support the limitation of appeals to such final judgments, since to permit appeals from interlocutory orders would produce considerable delay and expense, as the present proceeding itself indicates.

ARGUMENT

THE JUDGMENT AND ORDER SOUGHT TO BE REVIEWED ARE NOT FINAL AND APPEALABLE

Except in situations not here material, the jurisdiction of the Federal appellate courts is by statute limited to the review of "final decisions" 28 U. S. C. 225 (a). A "final decision" is one that terminates the litigation on the merits and leaves nothing for the trial court to do but execute the judgment in case of affirmance. *St. Louis I. M. &*

S. R. R. Co. v. *Southern Ex. Co.*, 108 U. S. 24, 28; *State of Washington* v. *United States*, 87 F. 2d 421, 433 (C. C. A. 9). Consequently, a condemnation proceeding is ordinarily not reviewable "until after final judgment, disposing of the whole case, and adjudicating all the rights, whether of title or of damages, involved in the litigation. The case is not to be sent up in fragments * * *." *Luxton* v. *North River Bridge Co.*, 147 U. S. 337, 341. Such has been the repeated holding in this Court and the lower Federal courts. *Southern Ry. Co.* v. *Postal Telegraph Co.*, 179 U. S. 641, 643; *Grays Harbor Co.* v. *Coats-Fordney Co.*, 243 U. S. 251, 256; *Washington ex rel. McPherson Bros. Co.* v. *Superior Court*, 274 U. S. 726; *Ornstein* v. *Chesapeake & Ohio Ry. Co.*, 284 U. S. 572; *Dade County, Fla.* v. *United States*, 142 F. 2d 230 (C. C. A. 5); *Turnbull* v. *United States*, 139 F. 2d 126 (C. C. A. 6); cf. *Collins* v. *Miller*, 252 U. S. 364, 370; *United States* v. *Florian*, 312 U. S. 656.

In many States "judgments of condemnation" sustaining the condemnor's right to acquire particular property by condemnation are by statute reviewable in the state courts in advance of the determination of just compensation. But neither state statutes nor the conformity provisions of the Federal condemnation acts abrogate the plain requirements of the Judicial Code limiting review by the Federal courts to "final decisions." *Dieckmann* v. *United States*, 88 F. 2d 902 (C. C. A. 7).

Consequently this Court has refused to review such state court decisions, in advance of a remand for determination of just compensation, "for want of a final judgment." E. g. *Wick* v. *Superior Court,* 278 U. S. 574, 575; *Public Service Co.* v. *Lebanon,* 305 U. S. 558, 671.

Since just compensation for Parcel ED–7 has not yet been determined, it seems clear, under the foregoing authorities, that the judgment and order sought to be reviewed are not final and appealable.

Certainly, the order denying the motion to dismiss the petition was not appealable. Denial of a motion to dismiss the complaint in an ordinary civil action is not immediately reviewable even when the motion is based on jurisdictional grounds. *Roche* v. *Evaporated Milk Assn.,* 319 U. S. 21. And an order denying a motion to dismiss a condemnation petition, even when constitutional objections are raised, cannot be deemed a final judgment. *Dieckmann* v. *United States,* 88 F. 2d 902 (C. C. A. 7). Such a motion is comparable to a demurrer at common law and its denial is not reviewable until a final judgment has been entered. Nor may a litigant, each time he is dissatisfied with a ruling, file a motion to set it aside and, when the motion is denied, prosecute a piece-meal appeal. It is only when a motion to set aside is directed at a judgment which is final that an immediate appeal may be taken. Neither the "judgment" upon the declaration of taking nor the court's denial of the motion to va-

cate it is, we submit, a final judgment or a "final decision" as that term is used in 28 U. S. C. 225 (a). Cf. *Glinski* v. *United States,* 93 F. 2d 418 (C. C. A. 7); *Republic Supply Co. of California v. Richfield Oil Co.,* 74 F. 2d 909, 910 (C. C. A. 9).

The Declaration of Taking Act of 1931 contains no provision requiring the court to enter a judgment or order upon a declaration of taking. The Act provides that "upon the filing of said declaration of taking and of the deposit in the court, * * * title to the said lands * * * shall vest in the United States of America." "Clearly under provisions of the statute, condemnation is effected and title completely vested in the Government by the mere filing of a declaration of taking and a judgment adjudging title in the United States is wholly unnecessary. Such is the statutory mandate." *United States* v. *Sunset Cemetery Co.,* 132 F. 2d 163, 164 (C. C. A. 7); *Dade County, Fla.* v. *United States,* 142 F. 2d 230, 231 (C. C. A. 5). But in the interests of orderly procedure, the Department of Justice has adopted the policy of asking district courts to enter "judgments on the declaration of taking." Most district judges have assented. These "judgments" are obtained, generally *ex parte*, so as to advise the owners of the action that has been taken and for title recordation purposes.

The filing of a proper declaration of taking and the deposit of funds in court—not any judg-

ment or order giving effect to the declaration—vest title to the lands in the United States "in fee simple absolute, or such less estate or interest * * * as is specified in said declaration." The United States then becomes "irrevocably committed to pay the amount ultimately to be awarded as compensation." Declaration of Taking Act, Secs. 1, 5, *infra*, pp. 22, 24. The landowner is therefore concluded with regard to the taking, except as issues remain open for determination in the final judgment in the condemnation proceedings or as injunctive relief may be available. It was the legislative purpose that this should be so, for in the committee reports recommending adoption of the Act it is stated that the Government would "take title immediately, and leave the amount of compensation to be determined by the courts." Decisions of this Court sustaining summary condemnation procedure in the States are cited in the reports.[2] See *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 284; *Joslin Co.* v. *Providence*, 262 U. S. 668, 678; *Bragg* v. *Weaver*, 251 U. S. 57, 62; *Adirondack Railway* v. *New York State*, 176 U. S. 335, 349. The basic authority to condemn land for the purpose to which it is to be devoted is open to judicial inquiry; but

[2] H. Rep. 2086, 71st Cong., 3d sess. This report was adopted by the Senate Committee in S. Rep. 1325 of the same Congress. The act of 1931 was modeled upon Sec. 10 of the District of Columbia condemnation act of 1929 which is explained in similar terms in H. Rep. 1693, 70th Cong., 1st sess. and S. Rep. 1431, 70th Cong., 2d sess.

the quantity of land which is needed "is a legislative [i. e., administratively determinable] and not a judicial question." *United States* v. *Gettsburg Electric Ry.*, 160 U. S. 668, 685.

The fact that a "judgment" upon a declaration of taking absorbs a large measure of finality from the declaration which it supplements is therefore not a reason for holding that it is reviewable. Suggestions to the contrary, contained in cases upon which petitioner relies (Pet. Br. pp. 8–11, discussed *infra*, pp. 14–17) are, we submit, not well founded. Full judicial consideration enters into the determination of the "ultimate award" of compensation (Act of 1931, Sec. 3, *infra*, p. 23), from which an appeal of course lies. Issues going to the validity of the taking of the lands in question have, moreover, been regarded as open to consideration in connection with final judgments under the Declaration of Taking Act and upon appeal from such judgments. *Dade County, Fla.* v. *United States*, 142 F. 2d 230 (C. C. A. 5); *City of Oakland* v. *United States*, 124 F. 2d 959 (C. C. A. 9), certiorari denied, 316 U. S. 679. See *Potomac Electric Power Co.* v. *United States*, 85 F. 2d 243 (App. D. C.), certiorari denied, 299 U. S. 565. The validity of the taking has also been considered upon appeals from judgments of dismissal. *United States* v. *Carey*, 143 F. 2d 445 (C. C. A. 9); *United States* v. *Marin*, 136 F. 2d 388 (C. C. A. 9).

Still more drastic than the procedure under the Declaration of Taking Act is the authority of the Government under its requisitioning and expropriation powers to take possession of property without filing a condemnation proceeding of any kind, leaving the owner to his remedies under the Tucker Act. *United States* v. *North American Co.*, 253 U. S. 330, 333. If there is a valid statute authorizing the taking, an injunction will not issue, since the landowner's statutory right to recover compensation is adequate. *Hurley* v. *Kincaid*, 285 U. S. 95.

The Act contains ample internal evidence that the decree determining the amount of compensation and the other issues which are open until the close of a condemnation proceeding is the only judgment which is contemplated. The Act provides that the declaration may be filed "at any time before judgment" and that "compensation shall be ascertained and awarded in said proceeding and established by judgment therein."[3] The statute further provides that if the amount of the final award exceeds the deposit, "the court shall enter judgment against the United States for the amount of the deficiency." Subsequent sections of the Act (40 U. S. C. 258d, e) refer

[3] The Declaration of Taking Act provides a procedure which is merely ancillary to the main condemnation proceeding; it is not an independent statute by which land may be condemned. See R. 51; *United States* v. *17.280 Acres of Land, etc.*, 47 F. Supp. 267, 269 (D. Neb.).

to taking possession and title "in advance of final judgment in condemnation proceedings" and the Act is entitled (46 Stat. 1421) "An Act to expedite the construction of public buildings and works outside of the District of Columbia by enabling possession and title of sites to be taken in advance of final judgment in proceedings for the acquisition thereof under the power of eminent domain." Clearly the judgment intended, and the only one referred to in the Act, is the one which adjudicates finally the Government's right to condemn and determines the deficiency due the condemnee or, if the deposit was too high, the amount which should be refunded to the United States. Cf. *United States* v. *Miller*, 317 U. S. 369, 380–382; *Garrow* v. *United States*, 131 F. 2d 724 (C. C. A. 5), certiorari denied, 318 U. S. 765. As in the traditional condemnation proceedings, no appeal will lie until just compensation has been ascertained. *Dade County, Fla.* v. *United States*, 142 F. 2d 230, 231 (C. C. A. 5).

Notwithstanding the foregoing considerations, three circuit courts of appeals have entertained appeals by condemnees in advance of the determination of just compensation, after declarations of taking had been filed and "judgment" had been obtained upon them. *City of Oakland* v. *United States*, 124 F. 2d 959 (C. C. A. 9), certiorari denied, 316 U. S. 679; *United States* v. *243.22 Acres of Land*, 129 F. 2d 678 (C. C. A. 2), certi-

orari denied, 317 U. S. 698; *Puerto Rico Ry. Light and Power Co.* v. *United States,* 131 F. 2d 491 (C. C. A. 1). In the *City of Oakland* case, the absence of a final judgment was adverted to by the Government in its brief upon appeal, but the matter was not discussed by the Circuit Court of Appeals. The question was not raised in the certiorari proceedings. In *United States* v. *243.22 Acres of Land,* the Circuit Court of Appeals for the Second Circuit expressly refrained from deciding that a judgment upon a declaration of taking, such as that here involved, was appealable (129 F. 2d at 683, fn. 16), but held that a subsequent judgment of condemnation, following a hearing, which left the amount of compensation still to be determined was appealable, since the Government would immediately make permanent changes in the property. In the *Puerto Rico Ry. Light & Power Co.* case a judgment entered after similar proceedings was reversed upon the ground that the statutory authority for the taking had been exceeded both procedurally and because of its attempted application to condemn an entire utility system instead of merely realty. The court followed the opinion of the Second Circuit in the view that the conclusive vesting of title and immediate possession in the Government necessitated prompt appellate review.

The mere fact that the Government enters into possession of the condemned property and may

make physical changes immediately after filing a declaration of taking or after "judgment" upon such a declaration is not significant; for the authority to enter into immediate possession has prevailed under previous legislation without giving rise to appeals before final judgment. *Dade County, Fla.* v. *United States,* 142 F. 2d 230, 231 (C. C. A. 5); *United States* v. *Merchants Transfer & Storage Co.,* 144 F. 2d 324 (C. C. A. 9). The Act of August 18, 1890, 26 Stat. 316, as amended by the Acts of July 2, 1917, 40 Stat. 241, and April 11, 1918, 40 Stat. 518, *infra,* pp. 24–25, confers authority in time of war or other emergency to enter immediately into possession, and this statute was invoked in the instant case, possession being taken under it on March 31, 1942, the date the proceeding was begun.[4] The declaration of taking was not filed until November 12, 1942.[5] Hence it was not the judgment on the declaration of taking or the declaration itself which gave the Government possession, as distinguished from title, in the instant case. See *Eline's Inc.* v. *Town of Milwaukee, Wis.,* 135 F. 2d 878 (C. C. A. 7).

[4] Similar authority is conferred by the Second War Powers Act of March 27, 1942, 56 Stat. 177, 50 U. S. C. App., Supp. III, Sec. 632.

[5] The Government's primary purpose in filing declarations of taking in pending condemnation proceedings where it is already in possession is to provide the landowner with some compensation on account, and thus to reduce the interest liability of the United States. See *United States* v. *Miller,* 317 U. S. 369, 381; cf. *United States* v. *1,997.66 Acres of Land, More or Less, etc.,* 137 F. 2d 8 (C. C. A. 8).

The authorities previously cited show, moreover, that the scope of judicial consideration of the issues is not markedly different under the Declaration of Taking Act from that under previous procedures. The Act affords added protection to the landowner if possession has not already been taken by providing in Section 1 that upon the filing of a declaration of taking the court may "fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner." (*Infra*, p. 23.) In any event, neither the courts nor the Government can, for whatever reasons, confer appellate jurisdiction by creating "judgments" which are not "final decisions."

There are strong practical considerations in condemnation cases to support the limitation of appeals to final judgments, concluding the proceedings. Attacks upon the Government's power to condemn have very rarely been successful.[8] To permit appeals from interlocutory orders would

[8] The decision in *Puerto Rico Ry. Light and Power Co. v. United States*, 131 F. 2d 491 (C. C. A. 1) did not result in ousting the Government, because immediately after the decision, the property was taken under the Second War Powers Act. The present petitioners conceded in the court below that the Government could undoubtedly acquire the property here involved for the use in question under the Second War Powers Act (Act of March 27, 1942, 56 Stat. 177, 50 U. S. C. App., Supp. III, 632), which was in effect when the instant proceeding was filed. Therefore, even if the decision below were reversed, possession could be retained by amending the pleadings to invoke specifically the Second War Powers Act.

open the door to such appeals in many cases[7] and produce much unnecessary delay in the entry of final judgments.[8] The result in some instances would be that neighboring witnesses for the landowner and expert witnesses for the Government who saw the property before the improvements were made[9] might become difficult to locate at

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[7] In order to cut down liability for interest and to provide the dispossessed landowner with some money pending the judicial determination of just compensation, it is the practice of the Government to file declarations of taking in most condemnation proceedings, even though the Government is already in possession. See note 5, *supra*.

[8] Examples of this delay are the *243.22 Acres* case and the present controversy. The condemnation petition in the former case was filed in December 1940. The "judgment of condemnation" appealed from was entered January 20, 1942. The Second Circuit's decision sustaining the Government's right to condemn was rendered June 26, 1942. Because of an extension of time the petition for writ of certiorari was not filed until December 7, 1942, and, consequently, certiorari was not denied until January 11, 1943. 317 U. S. 698. Compensation was then determined and the landowner again appealed from the amount awarded. That appeal is still pending. In the instant case the order refusing to vacate the judgment on the declaration of taking was entered on November 30, 1943 (R. 36). The issue of just compensation was to be heard at a trial set for December 20, 1943. On December 9, 1943, petitioners filed their notice of appeal (R. 37), thus necessitating a postponement of the valuation trial. Had they waited another two weeks, all proper issues could have been heard on a single appeal.

[9] Property is valued in its condition on the date of taking of possession or title (whichever is prior in point of time), rather than as of the date of the trial. *United States* v. *Miller*, 317 U. S. 369; *Danforth* v. *United States*, 308 U. S. 271; *United States* v. *Rogers*, 255 U. S. 163, 169.

the time of trial. The landowner would in the meanwhile be deprived of compensation to which he might be entitled beyond the amount deposited with the declaration of taking, and the United States would become liable for interest at six percent upon the additional amount during the period of delay. The prompt disposition of condemnation proceedings is important both to the Government and to landowners. Even when practical considerations point the other way, there is insufficient reason for permitting preliminary and piece-meal appeals, which would evade the Congressional enactment limiting review to "final decisions." *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 30.

CONCLUSION

For the foregoing reasons we urge that the judgment of the court below should be affirmed.

The request is made in the petitioners' brief that their contention upon the merits be considered by this Court. It is conceded that this issue was not advanced in the petition for a writ of certiorari (Pet. Br. 11). We respectfully refer to the Government's brief in opposition, pages 16–18, for a statement of our views upon this issue, if the Court should wish to examine the question. The question raised, as we also believe, is of the variety which this Court has held not

to be open to judicial examination. Cf. *supra*, pp. 11–12, 13; *Old Dominion Co.* v. *United States*, 269 U. S. 55, 66–67.

Respectfully submitted.

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Solicitor General.

J. EDWARD WILLIAMS,
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Department of Justice.

JANUARY 1945.

APPENDIX

Section 128 of the Judicial Code, 28 U. S. C. sec. 225 (a) provides:

> The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—
>
> First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title.

The Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. secs. 258a–258e, provides:

> CHAP. 307. An Act To expedite the construction of public buildings and works outside of the District of Columbia by enabling possession and title of sites to be taken in advance of final judgment in proceedings for the acquisition thereof under the power of eminent domain.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the

petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

(1) A statement of the authority under which and the public use for which said lands are taken.

(2) A description of the lands taken sufficient for the identification thereof.

(3) A statement of the estate or interest in said lands taken for said public use.

(4) A plan showing the lands taken.

(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency.

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

SEC. 2. No appeal in any such cause nor any bond or undertaking given therein shall operate to prevent or delay the vesting of title to such lands in the United States.

SEC. 3. Action under this statute irrevocably committing the United States to the payment of the ultimate award shall not be taken unless the chief of the executive department or agency or bureau of the Government empowered to acquire the land shall be of the opinion that the ultimate award probably will be within any limits prescribed by Congress on the price to be paid.

SEC. 4. The right to take possession and title in advance of final judgment in condemnation proceedings as provided by this Act shall be in addition to any right, power,

or authority conferred by the laws of the United States or those of any State or Territory under which such proceedings may be conducted, and shall not be construed as abrogating, limiting, or modifying any such right, power, or authority.

SEC. 5. In any case in which the United States has taken or may take possession of any real property during the course of condemnation proceedings and in advance of final judgment therein and the United States has become irrevocably committed to pay the amount ultimately to be awarded as compensation, it shall be lawful to expend moneys duly appropriated for that purpose in demolishing existing structures on said land and in erecting public buildings or public works thereon, notwithstanding the provisions of section 355 of the Revised Statutes of the United States: *Provided*, That in the opinion of the Attorney General, the title has been vested in the United States or all persons having an interest therein have been made parties to such proceeding and will be bound by the final judgment therein.

Approved, February 26, 1931.

[4]The pertinent portion of the War Purposes Act of August 18, 1890, 26 Stat. 316, as amended by the Acts of July 2, 1917, 40 Stat. 241, and April 11, 1918, 40 Stat. 518, 50 U. S. C. sec. 171, provides:

> The Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed

for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operations of such plants; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted * * *. *And provided further,* That when such property is acquired in time of war, or the imminence thereof, upon the filing of the petition for the condemnation of any land, temporary use thereof or other interest therein or right pertaining thereto to be acquired for any of the purposes aforesaid, immediate possession thereof may be taken to the extent of the interest to be acquired and the lands may be occupied and used for military purposes.

U. S. GOVERNMENT PRINTING OFFICE: 1941

SUPREME COURT OF THE UNITED STATES.

No. 419.—October Term, 1944.

Daniel K. Catlin, et al., as Trustees under Deed Dated February 1, 1921, etc., Petitioners,
vs.
The United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[February 26, 1945.]

Mr. Justice Rutledge delivered the opinion of the Court.

The proceeding is for the condemnation of land in Madison County, Illinois, under the War Purposes Act of 1917.[1] The question for review is whether orders entered in the course of the proceedings are appealable as "final decisions" within the meaning of Section 128 of the Judicial Code, as amended, 28 U. S. C. §225(a).[2]

The petition for condemnation was filed in the District Court March 31, 1942. The same day an order for immediate possession was entered ex parte. On November 12, 1942, pursuant to the

[1] Act of August 18, 1890, 26 Stat. 316, as amended by the Acts of July 2, 917, 40 Stat. 241, and April 11, 1918, 40 Stat. 518, 50 U. S. C. § 171. The Act provides:

"That hereafter the Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed *for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operations of such plants;* such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted. . . . And provided further, That when such property is acquired in time of war, or the imminence thereof, *upon the filing of the petition* for the condemnation of any land, temporary use thereof or other interest therein or right pertaining thereto to be acquired for any of the purposes aforesaid, *immediate possession thereof may be taken* to the extent of the interest to be acquired and the *lands may be occupied and used for military purposes.* . . ." (Emphasis added.)

[2] Section 128 is in part as follows:

"The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—

"First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title."

Declaration of Taking Act of February 26, 1931,[3] the Secretary of War filed a declaration and deposited in court $43,579.00 as the estimated compensation for Tract ED-7, to which petitioners assert ownership as trustees. The court thereupon entered "judgment," likewise ex parte, decreeing that title had vested in the United States upon the filing of the declaration and making of the deposit, also declaring the right of just compensation "now vested in the persons entitled thereto," and holding the cause open for further "orders, judgments and decrees."

Thereafter, on August 2, 1943, an order for service of process by publication was entered, and in October following petitioners moved to vacate the "judgment" and to dismiss the petition as to Tract ED-7. After this the Government amended its petition[4] and petitioners filed an amended motion to vacate and dismiss[5] which the court denied. From this order and the order entering the "judgment" on the declaration of taking, petitioners appealed. The Circuit Court of Appeals held the orders not final decisions within Section 128 and dismissed the appeal. 142 F. 2d 781. We granted certiorari, 323 U. S. —, in order to resolve conflict upon this question among several Circuit Courts of Appeals.[6]

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[3] 46 Stat. 1421, 40 U. S. C. §§ 258a-258e. Material portions of the statute are set forth in the text of this opinion and the notes.

[4] Petitioners attacked the original petition for failure to set forth (1) the purpose of the acquisition or that it was for any purpose authorized by the act; (2) that the Secretary of War had found that the land was needed or (3) had requested the Attorney General to institute the proceeding to acquire it for such a purpose. Considering these objections jurisdictional, petitioners regard "all further proceedings based upon the said petition" as "ineffective," including the filing of the first declaration of taking and the "judgment" entered pursuant to it.

The amendment added a new paragraph to the petition stating the lands were being taken for purposes described in the language of the statute and incorporated in the petition the letter of the Secretary of War requesting the Attorney General to institute the proceedings to acquire the land "for use in the establishment of the Granite City Engineer Branch Depot." This is the specific purpose which petitioners say does not come within any set forth in the statute, for which see note 1.

[5] The amended motion urged that the amendment of the petition, by incorporating the Secretary's statement of intended use for an engineer depot, caused the petition to show on its face that the use was not within those authorized by the act. Petitioners assert the amendment "came too late to validate" the "judgment."

[6] Dade County, Fla. v. United States, 142 F. 2d 230 (C. C. A. 5), accords with the decision in this case. Contrary decisions were rendered in City of Oakland v. United States, 124 F. 2d 959 (C. C. A. 9), cert. denied, 316 U. S. 679; United States v. 243.22 Acres of Land, 129 F. 2d 678 (C. C. A. 2), cert.

We think the judgment was right. Petitioners' motions raised issues grounded in contentions that the taking was not for a purpose authorized by the War Purposes Act.[7] Accordingly they urged that neither petition stated a cause of action, the court acquired no jurisdiction of the cause or to enter the order relating to title, and it was error to deny the motion to vacate and to dismiss. Since the issue here is whether the orders are final for purposes of appeal, we assume, though we do not decide, that the substantive issues have sufficient merit to warrant determination upon review. Even so, we think petitioners have mistaken their remedy.

Their right to appeal rests upon Section 128 of the Judicial Code. This limits review to "final decisions" in the District Court. A "final decision" generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. *St. Louis I. M. & S. R. R.* v. *Southern Ex. Co.*, 108 U. S. 24, 28. Hence, ordinarily in condemnation proceedings appellate review may be had only upon an order or judgment disposing of the whole case, and adjudicating all rights, including ownership and just compensation, as well as the right to take the property. This has been the repeated holding of decisions here.[8] The rule applies to review by this Court of judgments of state courts, in advance of determination of just compensation, although by local statute "judgments of condemnation," i. e., of the right to condemn particular property, are reviewable before compensation is found and awarded. *Wick* v. *Superior Court*, 278 U. S. 574, 575; *Public Service Co.* v. *Lebanon*, 305 U. S. 558, 571; cf. *Dieckmann* v. *United States*, 88 F. 2d 902. The foundation of this policy is not in merely technical conceptions of "finality." It is one against piecemeal litigation. "The case is not to be sent up in fragments. . . ." *Luxton* v. *North*

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denied, 317 U. S. 698; Puerto Rico Ry. Light & Power Co. v. United States, 121 F. 2d 491 (C. C. A. 2).

Under the comparable provision of the 1929 act applicable in the District of Columbia, where special appeal may be allowed upon interlocutory orders, D. C. Code (1940) § 17-101, compare Lee v. United States, 58 F. 2d 879, with Keye v. United States, 119 F. 2d 444.

[7] See notes 1, 4 and 5.

[8] Luxton v. North River Bridge Co., 147 U. S. 337, 341; Southern Ry. v. Postal Telegraph Co., 179 U. S. 641, 643; Grays Harbor Co. v. Coats-Fordney Co., 243 U. S. 251, 256; Washington *ex rel.* McPherson Bros. Co. v. Superior Court, 274 U. S. 726; Ornstein v. Chesapeake & Ohio Ry., 284 U. S. 572; cf. Collins v. Miller, 252 U. S. 364, 370; United States v. Florian, 312 U. S. 656.

River Bridge Co., 147 U. S. 337, 341. Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals.

The rule applies to proceedings under the War Purposes Act of 1917.[9] That act does not purport to change or depart from the generally prevailing rule concerning appeals in condemnation proceedings. It is an amended version of the 1890 act, under which from its enactment to now that rule has been applied; except in the three decisions of Circuit Courts of Appeals reaching the contrary result, where however the Declaration of Taking Act of 1931 also was involved.[10] The 1917 act purports to authorize no judgment except one "for the acquirement by condemnation of any land," etc., for the purposes specified or, necessarily, one finally denying this. The provision for the proceedings "to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted . . ." had no purpose to make the right of appeal in such proceedings depend upon and vary with the local procedure in this respect, cf. *Wick* v. *Superior Court, supra*; *Public Service Co.* v. *Lebanon, supra*, or to incorporate local ideas of "finality" in the application of Section 128 to such suits. The language may be applied in other ways without introducing so much lack of uniformity into the application of Section 128, if indeed the quoted provision has not been largely nullified by the Federal Rules of Civil Procedure in all respects concerning appeals.[11]

Furthermore, the 1917 act contemplated emergency action, to the extent that upon the filing of the petition immediate possession might be taken and the lands occupied "for military purposes" during war "or the imminence thereof." This purpose,

[9] No case has been found in which appeal was taken, or attempted to be taken, under the 1890 and 1917 acts, from an order other than the final judgment disposing of all issues raised in the proceeding, including compensation. The uniform practice under those acts appears to have been therefore to confine appeals to such orders. Only three cases appear to have sought to raise, in appeals from final judgments, the question of the right to condemn. See Forbes *v.* United States, 268 Fed. 273; Chappell *v.* United States, 81 Fed. 764, 160 U. S. 499; Henry *v.* United States, 46 F. 2d 640. Numerous other cases involved appeals on questions affecting compensation without raising question concerning title or authority to condemn.

[10] Cf. note 6 and text beginning with the paragraph following note 12.

[11] "In proceedings for condemnation of property under the power of eminent domain, these rules govern appeals but are not otherwise applicable." Rule 81(a)(7).

it seems clear, would be largely defeated, if entry must be deferred until specific challenges to jurisdiction and the sufficiency of the petition are determined seriatim, not only by ruling of the trial court but by separate appeals from each ruling which, if sustained,[12] would end the litigation, but if lacking in merit could only prolong it. We find neither in the language nor in the purposes of the 1917 act an intent to authorize departure from the general course of applying Section 128 in condemnation proceedings.

Indeed, we do not understand petitioners to urge that the 1917 act without more accomplishes the departure. They say rather that it does so when used in conjunction with the Declaration of Taking Act of 1931. It is the "judgment upon a declaration of taking" and the subsequent order denying their motion to vacate this "judgment" and to dismiss the proceedings which they contend are "final decisions" within Section 128 and therefore appealable. It is "judgments" of this character which the decisions of Circuit Courts of Appeals, upon which petitioners rely, have involved. One of them relied expressly upon the 1931 act as being intended "to sever the taking of title and possession from controversies as to valuation, and to provide a procedure whereby the United States might be speedily and conclusively vested with title and possession" and therefore as having a "final and immediate effect on property rights" which "obviously should be reviewable at once, without the necessity of awaiting the outcome of long drawn out controversies as to valuation." *Puerto Rico Ry. Light & Power Co.* v. *United States*, 131 F. 2d 491, 494. The reason stated might afford ground for Congress to provide a special appeal. However, we do not think the reason accords with the statute's provisions or their effect. Consequently it gives no ground for believing that Congress has provided a separate appeal.

We dispose shortly of the motion, or that part of it, which was directed at dismissal of the proceedings, in so far as it may require treatment separately from the motion to vacate the "judgment," if it does so at all. Had this motion been granted and judgment of dismissal been entered, clearly there would have been an end of the litigation and appeal would lie within Section 128. *United States* v. *Carey*, 143 F. 2d 445; *United States* v. *Marin*, 136 F. 2d 388. But denial of a motion to dismiss, even when the motion

[12] See United States v. Carey, 143 F. 2d 445; United States v. Marin, 136 F. 2d 388.

is based upon jurisdictional grounds, is not immediately reviewable. Cf. *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21. See also *Dieckmann* v. *United States*, 88 F. 2d 902. Certainly this is true whenever the question may be saved for disposition upon review of final judgment disposing of all issues involved in the litigation or in some other adequate manner. As will appear, we think such a remedy is available in this case.

The "judgment" and the order denying the motion to vacate it stand no better. The 1931 act, like that of 1917, contains no language purporting to change the general rule relating to appeals in condemnation proceedings. Section 1, which is the basic section, makes no express reference to appeals.[13] Section 2 implies the

[13] Because of its importance, the Section is set forth here in full, except for the concluding paragraph which is quoted in note 14:

"An Act *To expedite the construction of public buildings and works* outside of the District of Columbia *by enabling possession and title* of sites *to be taken in advance of final judgment* in proceedings for the acquisition thereof under the power of eminent domain.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That *in any proceeding* in any court of the United States outside of the District of Columbia which has been or may be *instituted* by and in the name of and under the authority of the United States *for the acquisition of any land* or easement or right of way in land for the public use, *the petitioner may file in the cause*, with the petition or at any time before judgment, *a declaration of taking* signed by the authority empowered by law to acquire the lands described in the petition, *declaring that said lands are thereby taken* for the use of the United States. Said declaration of taking shall contain or have annexed thereto—

"(1) A statement of the authority under which and the public use for which said lands are taken.

"(2) A description of the lands taken sufficient for the identification thereof.

"(3) A statement of the estate or interest in said lands taken for said public use.

"(4) A plan showing the lands taken.

"(5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

"*Upon the filing said declaration of taking and of the deposit in the court*, to the use of the persons entitled thereto, *of the amount of the estimated compensation* stated in said declaration, *title to the said lands* in fee simple absolute, or such less estate or interest therein as is specified in said declaration, *shall vest in the United States of America, and said lands shall be deemed to be condemned* and taken for the use of the United States, *and the right to just compensation for the same shall vest in the persons entitled thereto*, and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. No sum so paid into the court shall be charged with commissions or poundage.

"Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for

contrary effect. It provides: "No appeal in any such cause nor any bond or undertaking given therein shall operate to prevent or delay the vesting of title to such lands in the United States." While the section does not in terms deny the right of appeal contended for, neither does it confer that right. The possibility of delaying or preventing the vesting of title by appeals was explicitly in the mind of Congress, when it included this section. If it had thought granting an earlier appeal than the existing procedure allowed, upon the severed issue of the right to take the property, would expedite the taking or the vesting of title or the proceedings in any other manner, slight additional words would have made provision for such an appeal. The omission, and the clear import of the language used, are against the implication that separate appeals were to be allowed.

This seems reinforced by Section 4. It makes the right to take possession and title "in advance of final judgment" *additional* to other rights, powers or authority conferred by federal or local law, and expressly states that this right "shall not be construed as abrogating, limiting, or modifying any such right, power, or authority." One of the rights of the Government under pre-existing federal law was the right not to have the proceeding, or the taking of possession,[14] delayed by separate appeals over issues of title or taking.[15] Its right was rather to have these issues determined with others in the final judgment dispositive of the whole cause. This right, we think, was guarded by Section 4 against being construed as having been abrogated, limited or modified, by virtue of the *additional* right conferred "to take possession and title *in advance of final judgment.*" (Emphasis added) Other provisions of the statute, as will appear, support the same conclusion.

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or on account of the just compensation to be awarded in said proceeding. If the compensation finally awarded in respect of said lands, or any parcel thereof, shall exceed the amount of the money so received by any person entitled, the court shall enter judgment against the United States for the amount of the deficiency." (Emphasis added.)

[14] This was authorized by the Act of 1917, cf. note 1 above, as well as by the Act of 1931 in the concluding paragraph of Section 1, which is as follows:

"Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable."

[15] See note 9.

Moreover, the statute does not purport in terms to authorize such a "judgment" as was entered in this cause or to make its entry the event upon which title is changed, if so summary a procedure could be valid. The "judgment" apparently was entered ex parte, prior to service of process or publication of notice. Cf. *Pennoyer* v. *Neff*, 95 U. S. 714. By the terms of Section 1, "Upon the filing said declaration of taking [in the condemnation proceeding] and of the deposit in the court . . . title . . . shall vest in the United States . . . and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein. . . ."[16]

The exact effect of these provisions is not entirely clear. But we find nothing in the statute to indicate that Congress intended to deprive the owner of all opportunity to challenge the validity of the taking for departure from the statutory limits. Such a purpose cannot be implied from the provision for transfer of title itself and the fact that the specific references to the final judgment in Section 1 speak only concerning compensation. Those references, we think, are counterbalanced by other provisions and considerations, in so far as they may be thought to exclude matters of title from the final adjudication.

We think the purpose was to leave intact the owner's remedy existing before the statute was adopted. For one thing, the statute is not an independent one for condemnation. It provides for no new condemnation proceeding. It merely affords steps ancillary or incidental to suits brought under other statutes; and was so used in this case in conjunction with the suit brought under the Act of 1917. Its declared purpose is to expedite, in the cases to which it applies, the construction of public buildings and works "by enabling possession and title of sites to be taken *in advance of final judgment* in proceedings for the acquisition thereof under the power of eminent domain," (emphasis added) as the title states, and it applies to "any proceeding . . . instituted . . . under the authority of the United States for the acquisition of any land . . . for the public use. . . ." Section 1. The procedure clearly is ancillary to the main condemnation pro-

[16] See note 13 for the complete text.

eeding, cf. *United States*, v. *17,280 Acres of Land*, 47 F. Supp. 67, 269, is intended to dovetail with it and by Section 4 is declared expressly to provide rights which are to be "in addition to" preexisting rights and are not to "be construed as abrogating, limiting, or modifying" them. This provision, inserted primarily to safeguard the Government's interest, is not expressly so limited; and we think it may be applied also to safeguard the owner's preexisting rights where doing this will not be in essential conflict with the additional rights validly conferred on the Government. This would be done by preserving his preexisting right of appeal.

While the language and the wording of the act are not wholly free from doubt, we see no necessary inconsistency between the provisions for transfer of title upon filing of the declaration and making of the deposit and at the same time preserving the owner's preexisting right to question the validity of the taking as not being for a purpose authorized by the statute under which the main proceeding is brought. That result may be reached if the statute is construed to confer upon the Government, upon occurrence of the events specified, only a defeasible title in cases where an issue concerning the validity of the taking arises. So to construe the act would accomplish fully the purposes for which it was adopted in the large number of cases where no such issue is made. In others this would go far toward doing so, for not all such issues will be followed through to final decision or, if so followed, will turn out adversely to the Government. The alternative construction, that title passes irrevocably, leaving the owner no opportunity to question the taking's validity or one for which the only remedy would be to accept the compensation which would be just if the taking were valid, would raise serious question concerning the statute's validity. In any event we think it would run counter to what reasonable construction requires.

Some stress is placed upon the provisions of Sections 3 and 5 relating to irrevocable commitment of the United States to pay the amount ultimately to be awarded,[17] together with the pro-

[17] Section 3 is set forth in note 18. Section 5 is as follows:

"In any case in which the United States has taken or may take possession of any real property during the course of condemnation proceedings and in advance of final judgment therein and the United States has become irrevocably committed to pay the amount ultimately to be awarded as compensation, it shall be lawful to expend moneys duly appropriated for that purpose in demolishing existing structures on said land and in erecting public buildings

vision of Section 1 authorizing award of more than the amount deposited as estimated compensation, as indicating a purpose to make the transfer of title irrevocable upon the filing of the declaration and the making of the deposit.[18] From the fact that the Government may become irrevocably committed to pay, it does not follow that the owner is irrevocably committed to submit to the taking, since the statute's terms are not *in pari materia* in this respect. Neither Section 3 nor Section 5 purports to bind the owner irrevocably. On the contrary, Section 5 deals only with authority to expend appropriated funds for demolition of existing structures and construction of new ones; and the concluding proviso, requiring the opinion of the Attorney General that "title has been vested in the United States or all persons having an interest therein have been made parties to such proceeding and will be bound *by the final judgment therein,*" (emphasis added) before the funds are expended, seems clearly to contemplate that title is not indefeasibly vested in the United States merely by following the administrative procedure. Final judgment in "such proceeding," that is, the main condemnation suit, is necessary for that purpose. The operation of Sections 3 and 5 is to cut off the Government's right to abandon the proceedings. It is not to compel the owner to submit to unauthorized takings.

Accordingly, in our opinion the right of the owner to challenge the validity of the taking, for nonconformity with the prescribed statutory purposes, was not destroyed by the 1931 act. Nor was the right to do this upon appeal, existing before that act was adopted, affected. No such "severance" was made as the court deciding the *Puerto Rico* case thought was created. No new right of separate appeal was given. The preexisting right of appeal, including appeal on grounds relating to validity of the taking, remained in force to be exercised when and only when final judgment, disposing of the cause in its entirety, has been

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or public works thereon, notwithstanding the provisions of section 355 of the Revised Statutes of the United States: Provided, That in the opinion of the Attorney General, the title has been vested in the United States or all persons having an interest therein have been made parties to such proceeding and will be bound by the final judgment therein."

[18] Including or following the finding required by Section 3, which provides: "Action under this statute irrevocably committing the United States to the payment of the ultimate award shall not be taken unless the chief of the executive department or agency or bureau of the Government empowered to acquire the land shall be of the opinion that the ultimate award probably will be within any limits prescribed by Congress on the price to be paid."

rendered. The statute makes no other explicit provision. Nor is one so clearly implied that we can make it. The weightier implications are the other way.

We have not discussed other issues presented or suggested in the briefs or argument, since that has not been necessary to the disposition of this cause. These include the question whether, when possession has been taken and damage has been done to the premises in the course of proceedings not authorized, the remedy by appeal is adequate. That issue has not been made in this case, since the grounds urged rest upon the provisions of the 1931 act relating to title and their effect, through the proceedings had, upon the petitioners right. They do not relate simply to the taking of possession, the right to take it or damages resulting from exercise of that right, apart from the question of title. Possession in this case had been taken, pursuant to the terms of the 1917 act, prior to the time of the purported transfer of title. It will be time enough to consider the question concerning adequacy of the appeal or possible existence of other remedy affecting such a case when it arises.

The judgment is

Affirmed.

Mr. Justice ROBERTS and Mr. Justice DOUGLAS concur in the result.